TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible] 71.

JOHN J. MOORE, TRADING UNDER THE FIRM NAME OF J. J. MOORE & COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE [illegible], 1903.

(18,991.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 16, 1903.

1 In the Court of Claims.

JOHN J. MOORE, Trading under the Firm Name of J. J. Moore & Company,
vs.
THE UNITED STATES.
No. 21450.

I.—*Petition. Filed August* 10, 1899.

To the chief justice and judges of the Court of Claims:

The claimant, John J. Moore, trading under the firm name of J. J. Moore & Company, respectfully represents and shows:

1. That he is a citizen of the United States, residing in the city of San Francisco, in the State of California, has always yielded true allegiance to the United States, and is the owner of the claim hereinafter sued upon, it never having been sold or assigned to any person or persons whomsoever.

2. That on the 21st day of June, A. D. 1898, the claimant, a general commission merchant and shipper at San Francisco, California, entered into a contract in writing with the United States, through Lieutenant Colonel J. W. Pope, chief quartermaster U. S. V. United States Army, which contract is made a part hereof by this
2 reference thereto and will be introduced in evidence on the trial of the case; that the contract was approved by W. Merritt, major general U. S. A. commanding, on the 6th day of July, 1898; that by the terms and conditions of the contract, the claimant agreed to furnish and deliver to the quartermaster's department of the United States Army at Honolulu, Hawaiian islands, delivered at the wharf at the rate of not less than 100 tons per day, about 3,900 tons of the best merchantable "Wallsend" Australian steam coal, at 2,240 pounds to the ton, dangers of the sea and any causes beyond claimant's control excepted, the deliveries to commence on the arrival of the Hawaiian ship "Euterpe" at Honolulu on or about July 23rd, 1898, for and in consideration of which the claimant was to be paid at the office of the quartermaster, United States Army, at San Francisco, California, at the rate of $9 per ton, of 2,240 pounds, in gold coin of the United States.

3. That at the time of entering into such contract, it was, and ever since has been, the usage and custom of ship owners, shippers, commission merchants, freighters, and charterers at the port of San Francisco, California, when executing charter-parties, to make them contain a stipulation either in the following language, or in language substantially like it, to wit:

"To be discharged as customary, in such customary berth or place as consignees shall direct, ship being always afloat, and at the average rate of not less than one hundred tons per weather working day (Sundays and holidays excepted), to commence when the ship

is ready to discharge, and notice thereof has been given by
3 the *captain* in writing; if detained over and above the said laying days, demurrage to be at 4*d.* register ton per day."

That at the time of the execution of the contract hereinbefore mentioned, and ever since that time, the officers of the United States Army, at San Francisco, California, representing the United States in contract and business relations, had notice and knowledge of the usage and custom aforesaid.

That at the time of chartering the "Euterpe," the claimant, pursuant to such usage and custom, and at the instance and request of the owners of the ship, entered into a written agreement, or charter-party, with such owners, which contained the stipulation above quoted, and that the demurrage therein stipulated for was usual, reasonable and proper.

4. That the claimant entered upon the discharge of the contract, and caused the Hawaiian ship "Euterpe," which claimant had chartered, to be loaded with 1,543 tons of the best merchantable "Wallsend" Australian steam coal, to arrive at Honolulu, Hawaiian islands, July 31st, 1898; that her cargo of coal was not finally discharged to, or taken possession of by, the United States until August 29th, 1898, making 30 days inclusive in which the vessel and cargo lay at that port; that, allowing 24 hours after the arrival of the ship and cargo and the giving of notice by the captain to the United States of her readiness to discharge, the ship was 27 days in discharging her cargo of 1,543 tons of coal, whereas had she been discharged according to the terms of the contract, at the rate of
4 not less than one hundred tons per day, the cargo should have been discharged to and received by the United States in sixteen days; and that during all that time, the "Euterpe" and the consignors of the coal were ready to discharge it according to the terms of the contract, but the United States failed to comply therewith, as hereinbefore stated, thus causing the loss of 11 days of time, after duly allowing for Sundays, and to the damage of the claimant in the sum of $1,053.36 which is at the rate of 4*d.* coin of Great Britain, per register ton per day, the register tonnage of the "Euterpe" being 1,197 tons, that being the amount of the damage or demurrage and reasonably lawfully charged against the claimant by the owners of the ship for such 11 days' loss of time, and which claimant paid to the owners of the ship lawfully and rightfully.

5. The claimant avers that the delays and defaults of the United States, as in this paragraph of the petition set forth, were to his damage in the sum of $1,053.36 which is due to him and unpaid, and that no action on the claim has been taken by the United States except a failure to pay that amount upon the demand of the claimant.

Wherefore the claimant prays judgment on this paragraph of the petition for one thousand and fifty-three dollars and thirty-six cents.

Second paragraph.

The claimant, John J. Moore, trading under the firm name of J. J. Moore & Company, further respectfully represents and shows:

1. That he is a citizen of the United States, residing in the
5 city of San Francisco, in the State of California, has always yielded true allegiance to the United States, and is the owner of the claim hereinafter sued upon, it never having been sold or assigned to any person or persons whomsoever.

2. That on the 23d day of June, A. D. 1898, the claimant, a general commission merchant and shipper at San Francisco, California, entered into a contract in writing with the United States, through Lieut. Colonel J. W. Pope, chief quartermaster U. S. V. United States Army, which contract is made a part hereof by this reference thereto, and will be introduced in evidence on the trial of the case; that the contract was approved by W. Merritt, maj. general U. S. A. commanding, on the 6th day of July, 1898; that by the terms and conditions of the contract, the claimant agreed to furnish and deliver to the quartermaster's department of the United States Army at Honolulu, Hawaiian islands, delivered on the wharf as customary, at the rate of not less than 100 tons per day, about 5,000 tons of the best merchantable "Australian," "Seaham," "Wallsend" or "Pacific Co-operative" steam coals, at 2,240 pounds to the ton, dangers of the sea and any causes beyond claimant's control excepted, the deliveries to commence at Honolulu on or about October 1st, 1898, for and in consideration of which the claimant was to be paid at the office of the quartermaster, United States Army, at San Francisco, California, at the rate of $9 per ton, of 2,240 pounds, in gold coin of the United States.

3. That at the time of entering into contract, it was, and ever since has been, the usage and custom of ship owners, shippers,
6 commission merchants, freighters and charterers at the port of San Francisco, California, when executing charter-parties, to make them contain a stipulation either in the following language, or in language substantially like it, to wit:

"To be discharged as customary, in such customary berth or place as consignees shall direct, ship being always afloat, and at the average rate of not less than one hundred tons per weather working day (Sundays and holidays excepted) to commence when the ship is ready to discharge, and notice thereof has been given by the *captain* in writing; if detained over and above the said laying days, demurrage to be at 4*d.* per register ton per day."

That at the time of the execution of the contract hereinbefore mentioned, and ever since that time, the officers of the United States Army at San Francisco, California, representing the United States in contract and business relations, had notice and knowledge of the usage and custom aforesaid. That at the time of chartering the ships hereinafter named, the claimant, pursuant to such usage and custom, and at the instance and request of the owners of the ship, entered into a written agreement, or charter-party, with such owners,

which contained the stipulation above quoted, and it is averred that the demurrage therein stipulated for was usual, reasonable and proper.

4. That the claimant entered upon the discharge of the contract aforesaid, and caused the American bark "Harvester," which he had chartered, loaded with 2,179 tons of the best merchantable "Australian," "Seaham," "Wallsend" or "Pacific Co-operative" steam
7 coals, to arrive at Honolulu, Hawaiian islands, August 28, 1898; that her cargo of coal was not delivered to, or taken into possession by, the United States until October 7th, 1898, making 41 days inclusive in which the vessel and cargo lay at that port; that, allowing 24 hours after the arrival there of the ship and cargo, and the giving of notice by the captain to the United States of her readiness to discharge the cargo, the ship was 35 days after allowing for Sundays and holidays in discharging her cargo of 2,179 tons, whereas had she been discharged according to the terms of the contract, at the rate of not less than 100 tons per day, after making all proper allowances, the cargo should have been discharged to and received by the United States in 22 days; that during all of that time, the ship and the consignors of the coal were ready to discharge it according to the terms of the contract, but the United States failed to comply therewith as hereinbefore stated, thus causing the loss of 13 days' time, to the damage of the claimant in the sum of $1,433.12 which is at the rate of 4*d.* coin of Great Britain per register ton per day, the register tonnage of the "Harvester" being 1,378 tons, that being the amount of the damage or demurrage reasonably and lawfully charged against the claimant by the owners of the ship for such 13 days' loss of time, and which he must pay to the owners lawfully and rightfully.

5. That in further compliance of the contract aforesaid, the claimant caused the British ship "General Gordon," which he had chartered laden with 2,455 tons of the best merchantable "Wallsend," "Australian," "Seaham" or "Pacific Co-operative" steam
8 coals, to arrive at the port of Honolulu, Hawaiian islands, August 27th, 1898, where she lay until October 4th, inclusive; that the captain gave notice to the United States of her arrival, and on the 9th, 10th, and 11th days of September, 1898, before the "General Gordon" had been given a berth at the wharf, the consul general of the United States took 330 tons from her while lying in the stream, putting the same directly into the United States transport "Arizona"; that it was not until the 14th of September, 1898, that the "General Gordon" was given a berth at the wharf so she could discharge the coal; that she lay at the wharf discharging her cargo for 16 days, and did not leave it until October 4th, 1898, at which time only was the last of her cargo discharged, making 39 days inclusive in which the vessel and cargo lay at that port; that allowing 24 hours after the arrival of the ship and cargo, and the giving of the notice by the captain to the United States of her readiness to discharge it, the ship was 31 days, after duly allowing for Sundays and holidays, in discharging a cargo of 2,455 tons, whereas had she been

discharged according to the terms of the contract, at the rate of not less than 100 tons per day, and after making all due allowances, the cargo should have been discharged to and received by the United States in 25 days' time; that during all of that time the "General Gordon" and the consignors of the coal were ready to discharge it according to the terms of the contract, but the United States failed to comply therewith as hereinbefore stated, thus causing the loss of six days' time, to the damage of the claimant
9 in the sum of $744.48 which is at the rate of 4*d.* coin of Great Britain per register ton per day, the register tonnage of the ship being 1,551 tons; that being the amount of the damage or demurrage reasonably and lawfully charged against the claimant by the owners of the ship for such 6 days' loss of time, and which he paid to the owners lawfully and rightfully.

7. That by the terms of the contract hereinbefore described, the claimant contracted and agreed to deliver to the United States about 5,000 tons of coal in the contract specified, at Honolulu, Hawaiian islands, the deliveries thereof to begin on or about the first day of October, 1898; that in pursuance of such agreement, the claimant, between the dates of September 9th and October 7th, 1898, delivered to the United States such coal at such port to the amount of 4,634 tons, the deliveries being made from the American bark "Harvester" and the British ship "General Gordon;" and that after delivering that amount there remained 366 tons to be delivered to the United States by the claimant in accordance with that contract, and that amount of coals, of the kind and quality described in the contract, he then and there tendered to the United States from the barkentine "Omega," but the United States declined to receive the coal, claiming for some unaccountable reason that the contract was completely filled when the claimant had delivered 4,634 tons; that this refusal of the United States to receive the 366 tons of coal as aforesaid, obliged and compelled the claimant to sell it in the open market in Honolulu to the best and highest bidder, which
10 he did, and at a less price than the United States had contracted to pay him therefor, namely, $3.06¼ per ton, or $1,120.87, and to his loss and damage in that amount.

8. The claimant avers that the delays and defaults of the United States herein set forth, were to his damage in the sum of $3,298.47 which is due to him and unpaid, and that no action on the claim has been taken by the United States, except a failure to pay that amount or any part thereof upon the demand of the claimant.

Wherefor- the claimant prays judgment on this paragraph of petition for three thousand two hundred and ninety-eight dollars and forty-seven cents.

And, on the whole petition, the claimant demands judgment for four thousand three hundred and fifty-one dollars and eighty-seven cents.

JOHN J. MOORE, *Petitioner.*

DUDLEY & MICHENER,
Attorneys for Claimant.

STATE OF CALIFORNIA, }
County of San Francisco, } ss:

John J. Moore, of lawful age, being duly sworn deposes and says that he is the claimant in the above-entitled case, that he has read the foregoing petition, and that the matters and facts therein set forth are true in substance and in fact as he is informed and verily believes.

J. J. MOORE.

Subscribed and sworn to before me, a notary public in and for the said State and county aforesaid, this 3d day of August, A. D. 1899.

GEO. T. KNOX,
Notary Public.

[SEAL.]

11 II.—*Traverse. Filed April* 28, 1903.

In the Court of Claims of the United States, December Term, A. D. 1902.

JOHN J. MOORE & Co. }
vs. } No. 21450.
THE UNITED STATES. }

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

12 III.—*Findings of Fact and Conclusion of Law, and the Opinion of the Court, and the Dissenting Opinion. Filed May* 25, 1903.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

Claimant is a loyal citizen of the United States residing at San Francisco, Cal., and is the owner of the claims in question, and has neither assigned nor sold them.

II.

Claimant is a commission merchant and entered into two several contracts with the defendant, duly signed, approved, and delivered, as follows:

"This agreement, entered into this twenty-first day of June, eighteen hundred and ninety-eight, between Lieut. Colonel J. W. Pope, chief quartermaster U. S. vols., United States Army, of the first part, and J. J. Moore, trading under the firm name of and hereinafter designated as J. J. Moore & Co., of San Francisco, in the county of San Francisco, State of California, of the second part, witnesseth, that the said Lieut. Colonel J. W. Pope, chief quartermaster U. S. volunteers, for and in behalf of the United States of America, and the said J. J. Moore & Co., for themselves, do covenant and agree, to and with each other, as follows:

"Article 1. That the said J. J. Moore & Co., themselves, their heirs, executors, and administrators, agree to furnish and deliver, subject to the inspection of a duly appointed agent of the United States, to the quartermaster's department of the United States Army at Honolulu, Hawaiian islands, delivered at the wharf at the rate of not less than one hundred (100) tons per day, about thirty-nine hundred (3,900) tons of best merchantable 'Walsend' Australian steam coal, at twenty-two hundred and forty (2,240) pounds to the ton, dangers of the sea and any causes beyond their control excepted.

13 "Article 2. Any alteration in present rate of duty to be for or against the purchaser.

"Article 3. That deliveries on this contract shall commence on the arrival of the British ship *Euterpe* at Honolulu, on or about the twenty-third day of July, eighteen hundred and ninety-eight; that deliveries on this contract shall, if required, commence on the — day of ——, eighteen hundred and —, provided that the agreement is approved by the proper authorities of the War Department; otherwise, not until such approval is obtained.

"Article 4. That it is expressly agreed and understood that this contract shall be noneffective until an appropriation adequate to its fulfillment is granted by Congress and is available.

"Article 5. That for and in consideration of the faithful performance of the stipulations of this agreement the parties of the second part shall be paid, at the office of the quartermaster, U. S. Army, who shall be designated by the quartermaster-general, U. S. Army, at San Francisco, California, as follows: For thirty-nine hundred (3,900) tons of Wallsend Australian coal, more or less, at the rate of nine dollars ($9.00) per ton of twenty-two hundred and forty (2,240) pounds, in gold coin of the United States.

"Article 6. That in case of failure of said parties of the second part to comply with the stipulations of this contract according to the true intent and meaning thereof, then the party of the first part shall have the power to supply deficiency by purchase in open market and to charge up against the party of the second part the extra cost over contract price of any coal so procured.

"Article 7. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferer or the transferee, but all rights of action for any breach of this contract by said J. J. Moore & Co. are reserved to the United States.

"Article 8. No member of or delegate to Congress, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract or to any benefit which may arise herefrom.

"This contract shall be subject to approval of the quartermaster-general U. S. A."

"This agreement, entered into this twenty-third day of June, eighteen hundred and ninety-eight, between Lieut. Colonel J. W. Pope, chief quartermaster, U. S. vols., United States Army, of the first part, and J. J. Moore, doing business under the firm name of and hereinafter designated as J. J. Moore & Co., of San Francisco, in the county of San Francisco, State of California, of the second part, witnesseth, that the said Lieut. Colonel J. W. Pope, chief quartermaster, U. S. volunteers, for and in behalf of the United States of America, and the said J. J. Moore & Co., for themselves, do covenant and agree to and with each other as follows:

"Article 1. That the said J. J. Moore & Co. agree to furnish and deliver, subject to inspection of a duly appointed agent of the United States, to the quartermaster's department of the United States Army at Honolulu, Hawaiian islands, delivered on wharf as customary, at a rate of not less than one (100) hundred tons per day, about five thousand (5,000) tons of best-quality Australian Seaham, 14 Wallsend, or Pacific Cooperative steam coals, at twenty-two hundred and forty (2,240) pounds to the ton, dangers of the sea and any causes beyond their control excepted.

"Article 2. Any alteration in present rate of duty to be for or against the purchaser.

"Article 3. That deliveries on this contract shall commence with a cargo of about twenty-two hundred (2,200) tons of coal, to arrive at Honolulu, Hawaiian islands, on or about the first day of October, eighteen hundred and ninety-eight, and to sail from Australia in about twenty-five (25) days after signing of this contract. That deliveries on this contract shall, if required, commence on the -- day of —— eighteen hundred and —, provided that the agreement is approved by the proper authorities of the War Department; otherwise not until such approval is obtained.

"Article 4. That it is expressly agreed and understood that this contract shall be noneffective until an appropriation adequate to its fulfillment is granted by Congress and is available.

"Article 5. That for and in consideration of the faithful performance of the stipulations of this agreement the parties of the second part shall be paid at the office of the quartermaster, U. S. Army, who shall be designated by the quartermaster-general, at San Fran-

cisco, California, as follows: For five thousand (5,000) tons of Seaham, Wallsend, or Pacific Cooperative steam coals, as specified, the sum of nine dollars ($9.00) per ton of 2,240 pounds, in gold coin of the United States.

"Article 6. That in case of failure of the said parties of the second part to comply with the stipulations of this contract, according to the true intent and meaning thereof, then the party of the first part shall have the power to supply deficiency by purchase in open market and to charge up against the party of the second part the extra cost over contract price of any coal so procured.

"Article 7. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferer or the transferee, but all rights of action for any breach of this contract by said J. J. Moore & Co. are reserved to the United States.

"Article 8. No member of or delegate to Congress, nor any person belonging to or employed in the military service of the United States is or shall be admitted to any share or part of this contract or to any benefit which may arise herefrom.

"This contract shall be subject to approval of the quartermaster general, U. S. A."

Preliminary to the making of said contracts the following correspondence occurred:

"SAN FRANCISCO, CAL., *June 13th*, 1898.

"Major W. A. Wadsworth, United States volunteers.

"DEAR SIR: We beg to offer you, for reply on or before 3 o'clock to-morrow, the 14th inst., a cargo of about 1,600 tons of Wallsend Australian coal delivered at Honolulu, H. I., per British ship *Euterpe* (which sailed from Newcastle, N. S. W., for Honolulu about 10 days ago, and is therefore due to arrive in 30 or 40 days). The price to be ($9.00) nine dollars per ton of 2,240 pounds delivered at Honolulu. Payment to be made at your option in United States gold coin at Honolulu after discharge, or in this city in United States gold coin after receipt of certificate of delivery.

"We also offer you a cargo of about 2,300 tons per Chilean ship *Star of Italy* (now in Australia and due to leave there in about 25 days), delivered at Honolulu at the same price, terms, and conditions as the *Euterpe*. Or this last cargo we will sell delivered at Manila, Philippine islands, at ($12.75) twelve dollars and seventy-five cents per ton, and for this cargo payment can be made either in Manila or San Francisco in United States gold coin at your option in the same manner as described above on the *Euterpe* cargo.

"Trusting to have the pleasure of securing the business,

"We are, dear sir, yours, faithfully,

"J. J. MOORE & CO."

"P. S.—Both the *Euterpe* and *Star of Italy* are very fast sailers and can be depended on to make the voyage to Honolulu in 45 to 50 days or to Manila in 35 to 45 days.

"J. J. M. & CO."

"HEADQUARTERS U. S. EXPEDITIONARY FORCES,
"AND DEPARTMENT OF PACIFIC,
"OFFICE ASSISTANT TO CHIEF QUARTERMASTER,
"*June* —, 1898.

"J. J. Moore & Co., San Francisco.

"GENTLEMEN: Referring to your answer to advertisement for proposals for coal on June 13th, I beg to inform you that I am authorized to accept the cargo of 1,600 tons in ship *Euterpe* and that of 2,300 per *Star of Italy* for delivery in Honolulu.

"Will prepare contracts soon as possible.

"Very truly, yrs.,

"W. A. WADSWORTH,
"*Maj. and Q. M.*"

"SAN FRANCISCO, CAL., *June 21st*, 1898.

"Colonel J. W. Pope, quartermaster-general U. S. volunteers.

"DEAR SIR: We beg to offer you for reply on or before 4 p. m. Friday next, the 24th inst., about 5,000 tons of Australian Wallsend, Seaham, or Pacific first-quality steam coals, to be delivered at Honolulu prior to October 1st, 1898, perils of the sea excepted. The price to be $9.00 (nine dollars) per ton of 2,240 lbs. (exclusive of duty, if any), to be delivered on wharf as customary.

"Payment to be in United States gold coin at San Francisco or Honolulu, at your option.

"We are, dear sir, your obedient servants,

"J. J. MOORE & CO.

"SAN FRANCISCO, CAL., *June 22nd*, 1898.

"Col. J. W. Pope, quartermaster-general U. S. volunteers.

"DEAR SIR: Referring to our offer to you yesterday of 5,000 tons of Australian coals at Honolulu, in connection therewith we
16 now beg to substitute our offer by guaranteeing the first vessel, with the capcity of about 2,200 tons, to sail from Newcastle, N. S. W., within 25 days after signing of contract. We may further add that we expect the vessel to get away within 10 or 15 days, and ask for the extra 10 days only as a precautionary measure to guard against accidents.

"We are, dear sirs, yours, faithfully,

"J. J. MOORE & CO."

"HEADQUARTERS U. S. EXPEDITIONARY FORCES AND
"DEPARTMENT OF PACIFIC,
"OFFICE OF CHIEF QUARTERMASTER,
"SAN FRANCISCO, CAL., *June 22d*, 1898.

"J. J. Moore & Co., 418 California St., San Francisco, Cal.

"DEAR SIR: Replying to your letters of 21st and 22d insts., relative to 5,000-ton delivery of Seaham, Wallsend, or Pacific Co-op. Australian coal at Honolulu at $9.00 ton of 2,240 pounds, with shipment of 2,200 tons within 25 days of signing of contract, I have the honor to state that your offer is accepted, and contract will be drawn immediately.

"Very respectfully,
"J. W. POPE,
"*Lieutenant-Colonel and Chief Quartermaster*
"*U. S. Volunteers, Chief Quartermaster.*"

III.

That at the respective times these contracts were made it was the custom at San Francisco between shippers and shipowners to insert in their charter parties a stipulation to the effect that cargoes were to be discharged as customary, in such customary berth or place as consignee shall direct, ship being always afloat, and at an average specified number of tons per weather working days (Sundays and holidays excepted), to commence when ship is ready to discharge, and notice thereof has been given by the captain in writing, and if detained over and above the said laying days, demurrage to be at 4d. register ton per day, which stipulation was duly inserted in the contract of the claimant with the ships employed by him to transport the coal mentioned in the contracts. It does not appear that the officers and agents of the defendant, who were authorized to make, and did make, the contracts for the defendant, had knowledge or notice of such custom, nor that the contracts or either of them were made in view of such custom.

IV.

The claimant discharged his said contracts as follows: *The first contract:* By the arrival at Honolulu of the ship *Euterpe* with 1,543 tons of coal, July 31, 1898, which was placed in berth at the wharf by the harbormaster of said port August 8, 1898, at 2.15 p. m., and commenced discharging coal at 3 p. m. same day, and finished August 29, 1898, consuming eighteen working days. If she had been discharged at not less than 100 tons per day, the time consumed would have been sixteen days. It does not appear that the
17 defendant was at fault either in the loss of time in arriving at the wharf, nor in the discharge of the cargo afterwards. The court finds the defendant was able, ready, and willing to receive the cargo as rapidly as discharged at the wharf. The claimant paid to the shipowner $1,053.36 demurrage for these delays.

The second contract: 1. By the arrival of the bark *Harvester*, with 2,179 tons of coal, August 28, 1898, at Honolulu, which was placed at a berth at the wharf by the harbormaster September 16, 1898, and began discharging coal on that date, and completed same October 7, 1898, a period of eighteen working days. It does not appear that the defendant was at fault in the loss of time of said last-mentioned ship in arriving at the wharf.

2. By the arrival of the ship *General Gordon* at Honolulu. August 27, 1898, with 2,455 tons of coal. While at anchor, September 9, 10, and 11, 330 tons were discharged into steamship *Arizona*, a transport of defendant, for its own use, after which the *Gordon* was placed at a berth at the wharf by the harbormaster, September 14, at 1 p. m., and then commenced the further discharge of the cargo, completing the same October 4, no delays having occurred at the wharf. It does not appear the defendant was at fault in the ship's delay in reaching the wharf. In the case of each ship the defendants had notice in writing of their respective arrivals within twenty-four hours thereafter. The wharves at Honolulu are under the control of a harbor master. The practice of such harbor master was to assign ships to berths at the wharves in the order of their respective arrivals, and this practice was followed by him in respect to the ships mentioned. Claimant paid said shipowners for delays, $1,433.12 to the *Harvester* and $744.48 to the *General Gordon*. All coal delivered was paid for by defendant.

V.

The coal actually delivered under the second contract was 4,634 tons, completed October 7, 1898. About a month subsequent to this claimant purchased 366 tons of coal of the barkentine *Omega*, then in the Honolulu harbor, and tendered the same to the defendant upon its contract of June 23, 1898, but the defendant refused to receive it, whereupon claimant sold the same in market, for the best price he could obtain, at $3.06¼ per ton less than $9, the contract price with the defendant, equivalent to $1,120.87, in all and to his loss in that amount.

(J. R.)

VI.

At the time of the delivery of the coal mentioned in the foregoing findings the Honolulu harbor had eleven docks or wharves, three of which only were used for the discharge of coal. The docks were crowded, and several vessels were moored at the reef. By local regulations of the government, a harbor master had general supervision of all vessels in the harbor, and all vessels were anchored and assigned to berths, in the order of their arrival, by the harbor master. There were no lighters for public use, and defendant had none at the port, and it was usual or customary to discharge freight upon the wharves. The defendant had no authority over the wharves, and was subject to local regulations, and the order of the harbor master, the same as individuals.

18 Upon the foregoing findings of fact the court decides the claimant is not entitled to recover, and his petition should be dismissed.

WRIGHT, J., delivered the opinion of the court:

Claimant is a commission merchant and entered into two several contracts with the defendant, one June 21, 1898, the other June 23, 1898, by the first of which he sold and undertook to deliver about 3,900 tons of coal to the quartermaster's department of the United States Army at Honolulu, Hawaiian islands, to be delivered at the wharf at the rate of not less than 100 tons per day, 2,240 pounds to the ton, the delivery under the first contract to commence on the arrival of the British ship *Euterpe* at Honolulu, on or about July 23, 1898, for which defendant agreed to pay $9 per ton. By the second contract claimant sold and undertook to deliver at Honolulu, on wharf as customary, at a rate not less than 100 tons per day, about 5,000 tons of coal, at 2,240 pounds to the ton, the delivery on the second contract to commence with a cargo of about 2,220 tons, to arrive about October 1, 1898, to sail from Australia about twenty-five days after signing the contract for which defendant agreed to pay $9 per ton. Prior to making the contracts, and as a preliminary step to their execution, claimant had submitted proposals in which the quantity subsequently specified on the first contract was segregated as about 1,600 tons, to be shipped on the *Euterpe*, and 2,300 tons upon another vessel; and in respect of the second contract to be shipped in a vessel with a capacity of about 2,200 tons, to sail from Newcastle within twenty-five days and the residue to be shipped otherwise, and from these propositions the contracts were evolved, introducing into them the language of claimant's propositions, "about 3,900 tons," and "about 5,000 tons," respectively.

At the time the contracts for coal were made it was a custom at San Francisco, where they were entered into, for shipowners to insert in their charter parties a stipulation to the effect that cargoes were to be discharged in such customary berth or place as consignee shall direct, ship always being afloat, at an average specified number of tons per day, to commence when ship was ready to discharge and notice thereof had been given to the consignee. If the ship should be detained beyond the lay days so provided, a stipulated sum was to be paid by the shipper as demurrage. Such stipulations were inserted in the contract of shipping between the claimant and the shipowners he employed to transport the coal in question, but it does not appear that the officers or agents of the defendant who made the contracts had knowledge or notice of such custom, nor that the contracts, or either of them, were made in view or contemplation of such custom.

The harbor at Honolulu was under the control of a harbor master at the time of the arrival of the several ships containing the coal designed for delivery to the defendant in conformity to the contracts in question, and all ships were assigned places at the wharf in the order of their arrival by such harbor master. Although de-

fendant was notified of the arrival of the ships in the harbor, there was delay in reaching a wharf where the cargoes were to be discharged, but such delay was not the fault of the defendant, nor the consequence of negligence on its part, but resulted from the
19 crowded condition of the harbor, the wharves then being occupied by vessels that had previously arrived, and assignments of claimant's ships to a wharf were made by the harbor master as soon as room could be provided for them in conformity to the usage of the port. After the arrival of some of the vessels at the wharf, the cargoes were not discharged as rapidly as the contracts required, but it does not appear defendant was at fault in this particular, but it does appear it had then the ability and was ready and willing to receive and dispose of the cargoes as rapidly as the ships would discharge them at the wharf. For these various delays of the ships, beyond the lay days stipulated in the charter parties, between claimant and the ship owners, the latter preferred claims for demurrage as provided in the shipping contracts, which the claimant paid, and in this suit seeks to recover of the defendant the several amounts of demurrage by him so paid.

The two ship loads of coal under the contract of June 23 fell 366 tons short of 5,000 tons, and a month after the last load was delivered the claimant, to make up this deficiency, purchased the shortage in the harbor and offered to deliver the same to defendant, but the latter refused to accept it, whereupon the claimant sold it in open market for the best price he could obtain, which fell short of the contract price with defendant, and this item of difference is also included in this suit, claimant insisting upon a right of recovery.

In support of his insistence of his right to demand of the defendant payment of demurrage paid by him, claimant contends that defendant was bound by the custom at San Francisco relative to the stipulations contained in the charter parties, and consequently, in that regard, by the charter parties also.

By his contracts with the defendant claimant undertook to deliver the coal at the wharf, and at the wharf as customary, at not less than the stipulated rate per day. By the plain terms of the contracts the claimant had as effectually obligated himself to take the coal to the wharf as he had to cross the sea. There is no ambiguity in the contract in this respect, and it needs no interpretation or construction upon this point, and as the actual terms employed in a written contract afford the most certain and determinate evidence of the intentions of the parties, usage is not admissible to contradict or supersede the positive and definite provisions secured thereby (*Bliven v. N. E. Screw Co.*, 23 Howard, 431), but only to explain whatever is indeterminate in their expression. Besides the presumption is that when the terms of a contract are reduced to writing, and are inconsistent with usage, the parties agree to waive the usage. (Story on Contracts, 649 *et seq.*). It is not admissible, by showing usage, to add to or engraft upon the contract new stipulations, nor to contradict those which are plain. (*Oelricks v. Ford*, 23 Howard, 63; *Insurance Cos. v. Wright*, 1 Wall., 471; *Hearne v. Insurance Co.*, 20 Wall., 492;

National Bank v. Burkhardt, 100 U. S. 692.) At most, it can only be said of the custom at San Francisco to insert certain stipulations in the charter party concerning lay days and demurrage, and the obligation of consignee to supply wharfage, that it was a local custom or usage, and relative to such a usage the Supreme Court said in *Barnard v. Kellogg* (10 Wall., 390):

"The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it. 'Usage,' says Lord Lyndhurst, 'may be admissible to explain what is doubtful; it is never admissible to contradict what is plain.' And it is well settled that usage cannot be allowed to subvert the settled rules of law. Whatever tends to unsettle the law and make it different in the different communities into which the State is divided leads to mischievous consequences and embarrasses trade and is against public policy. If, therefore, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom of the place where the contract was made. * * * 'A contrary doctrine,' says the court in *Thompson v. Ashton* (14 Johnson, 317), 'would be extremely pernicious in its consequences and render vague and uncertain all the rules of law on the sale of chattels.'"

It follows, therefore, from the views we have expressed, that claimant undertook the burden of delivering the coal at the wharf, and at the wharf as customary, and that the only custom the contract related to was such as prevailed at the port of delivery, and there it was necessary to the due performance of the terms of his contract to arrive at the wharf, and the intervening delays, without fault of the defendant, were as the common incidents of the voyages, the losses in consequence of which he possesses no right of action against the defendant. Relative to the failure of some of the ships to discharge cargo as rapidly as the contract required, after reaching the wharf, it does not appear this was the fault of defendant, and for the increase of lay days so occasioned there is no remedy. If fault there was, it was that of the shipmaster.

Neither was defendant bound to accept the 366 tons of coal purchased by claimant in the harbor a month after the delivery of the last ship cargo. The language, "about 5,000 tons," was that of the vendor, he having introduced it into the contract, and should be most strongly construed against him. (Chitty on Contracts, 136 and notes.) What was meant by the contract in this respect was that the

claimant proposed to and did sell two shiploads of coal, the ships having the combined capacity of about the quantity of coal specified. Such, clearly, was the intention of the parties to the contract. (*Brawley v. United States*, 96 U. S., 171.) The two ships arrived and their cargoes were delivered, and so the contract was fully executed before the 366 tons were purchased or offered.

From the views we have expressed it follows the petition should be dismissed, and it is ordered accordingly.

21 NOTT, Ch. J., dissenting:

There were two sets of correspondence eventuating in two contracts between the parties in this case. In the first correspondence the parties negotiated for the sale and purchase of two cargoes of coal on two designated vessels containing in the aggregate about 3,900 tons. In the second correspondence and contract they agreed upon the sale and purchase of "about 5,000 tons." It was also stipulated in the contract that the obligation of the purchaser should be to pay "for five thousand (5,000) tons" without any qualifying words, such as "more or less" or "about." The only reference to a cargo in this contract is that "deliveries on this contract shall commence with a cargo of 2,200 tons."

As regards the refusal of the defendants' officer to receive 366 of these 5,000 tons because the quartermaster department had more coal in Honolulu than was wanted, and the qualifying word of the quantity to be delivered, "about," the case comes under the decision of this and the Supreme Court in *Brawley's case* (11 C. Cls. R., 522; 96 U. S. R., 168). The English decisions have been stricter than the American in the latitude allowed to such qualifying words, but undoubtedly the more just as well as liberal ruling of the Supreme Court is the right one—that they extend only to "accidental variations" from the precise quantity agreed upon in the contract. These qualifying words are generally employed for the protection of the vendor, the difficulty of delivering the precise quantity being on him; and the question generally before a court is whether a vendor did all that could be reasonably required of him within the intent of the parties when they made the contract, or whether he is trying to evade its obligations. Certain it is that no court ever held that *a purchaser* could avoid accepting the precise quantity named in his contract by invoking the words "more or less" and "about."

The contract in this case provides that if the party of the second part—the vendor—should fail to comply with their stipulations, "then the party of the first part shall have the power to supply deficiency by purchase in open market and to charge up against the party of the second part the extra cost over contract price of any coal so procured." If the circumstances had been reversed—if the vendors had failed to procure and tender the "deficiency"—and the quartermaster had gone into the market and purchased coal at rates above the contract price, unquestionably it would be held, as it has been held in a hundred cases, that the claimant was bound to de-

liver 5,000 tons of coal. In the homely language of common sense, "It is a poor rule that won't work both ways."

My conclusion is that the claimants should recover for their loss on the 366 tons of coal tendered and refused.

22 IV.—*Judgment of the Court.*

J. J. MOORE AND COMPANY
v.
THE UNITED STATES. } No. 21450.

At a Court of Claims held in the city of Washington on the 25th day of May A. D. 1903 judgment was ordered to be entered as follows:

The court on due consideration of the premises finds for the defendants and do- order, adjudge and decree that the petition of the claimants be dismissed.

BY THE COURT.

23 V.—*Application for and Allowance of Appeal.*

The claimant hereby makes application for an appeal to the Supreme Court of the United States from the judgment of this court rendered May 25, 1903, dismissing his petition. The claimant assigns as error the conclusion of law which the court reached, and also the judgment of the court dismissing the petition.

The claimant is advised by counsel, and therefore assigns as errors, that the court, on the facts found, should have reached an opposite conclusion of law, and should have rendered judgment for the claimant in the sum of four thousand three hundred and fifty-one dollars and eighty-three cents ($4,351.83).

24 For the reasons above stated, the claimant asks that this, his application for appeal, be allowed, and that a transcript of the case be made and duly certified.

JOHN J. MOORE AND COMPANY,
By DUDLEY AND MICHENER,
His Attorneys of Record.

Filed June 20, 1903.

Order.

Let the appeal be allowed.

CHARLES C. NOTT,
Chief Justice.

June 22, 1903.

25 In the Court of Claims.

JOHN J. MOORE, Trading as John J. Moore and Company,
v.
THE UNITED STATES. } No. 21450.

I, John Randolph assistant clerk of the Court of Claims, certify that the foregoing are true copies of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court,—of the opinion of the court, and the dissenting opinion, of the judgment of the court, dismissing the petition, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims this 26th day of June A. D. 1903.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 18991. Court of Claims. Term No. 340. John J. Moore, trading under the firm name of J. J. Moore & Company, appellant, *vs.* The United States. Filed June 29, 1903.

FILE COPY.

Office Supreme Court U. S.
FILED
SEP 15 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 290 71.

JOHN J. MOORE, Trading under the Firm Name of J. J. Moore & Co., Appellant,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

APPELLANT'S BRIEF.

W. W. DUDLEY,
L. T. MICHENER,
Attorneys for Appellant.

HERMAN T. ELLIOTT PRINTING CO.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 340.

JOHN J. MOORE, Trading under the Firm Name of J. J. MOORE & COMPANY, *Appellant*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

The Facts.

On the 21st day of June, 1898, the claimant entered into a contract with the United States (p. 7, Art. I) to furnish and deliver, subject to the inspection of an agent of the United States, to the Quartermaster's Department of the United States Army at Honolulu, "delivered at the wharf, at the rate of not less than one hundred (100) tons per

day, about thirty-nine hundred (3900) tons of best merchantable Walsend Australian steam coal, at twenty-two hundred and forty (2240) pounds to the ton, dangers of the sea and any causes beyond their control excepted."

It was further contracted (p. 7, Art. III) "that deliveries on this contract shall commence on the arrival of the British ship *Euterpe* at Honolulu on or about July 23, 1898."

In Article I of the contract (p. 7) it was stipulated that the Government would pay for the coal at the rate of nine dollars per ton in gold coin of the United States.

Two days later, or June 23, 1898, the claimant entered into another contract with the United States (p. 8, Art. I) by which he agreed to furnish and deliver, subject to inspection of a duly appointed agent of the United States, to the Quartermaster's Department of the Army at Honolulu, "delivered on wharf as customary, at a rate of not less than one hundred (100) tons per day, of about five thousand (5,000) tons of best quality Australian Seaham, Walsend, or Pacific Co-operative steam coals, at twenty-two hundred and forty (2240) pounds to the ton, dangers of the sea and any causes beyond their control excepted."

It was also contracted (Art. III, p. 8), "that deliveries on this contract shall commence with a cargo of about twenty-two hundred (2200) tons of coal, to arrive at Honolulu, Hawaiian Islands, on or about the first day of October. 1898, and to sail

from Australia in about twenty-five (25) days after signing of this contract."

By Article V, page 8, it was contracted that the United States would pay for this coal nine dollars ($9.00) per ton in gold coin of the United States.

Preliminary to the making of these contracts the correspondence was had which is set forth in terms on pages 9, 10, and 11. Claimant began the correspondence in June, 1898, by offering a cargo of coal which should be "delivered at Honolulu, H. I., per British ship *Euterpe*," and he also offered another cargo of coal which should be "delivered at Honolulu at the same price, terms, and conditions as the *Euterpe*." Then follows a letter from the Quartermaster accepting the cargoes of the two ships "for delivery in Honolulu."

On the 21st and the 22d days of June, 1898, the claimant wrote letters offering five thousand tons of coal, "to be delivered at Honolulu prior to October 1, 1898, perils of the sea excepted, * * * to be delivered on wharf as customary."

On the 22d of June, 1898, the Quartermaster wrote, accepting the offer of the five thousand tons delivered "at Honolulu," and advising claimant that "contract will be drawn immediately."

It will be seen by the letter of June 22, 1898 (p. 11), that these contracts were to be drawn by the Quartermaster, a fact which we will consider later on, and there is abundant internal evidence that they were so written. (See the contracts.)

It was pursuant to this correspondence that the two contracts were drawn and executed.

At the time these contracts were made it was the custom at San Francisco, where all this business was transacted, as the record shows, between shippers and ship-owners, to insert in their charter-parties a stipulation to the effect that cargoes were to be discharged as customary, in such customary berth or place as assignee shall direct, ship being always afloat, and at an average specified number of tons per weather-working day (Sundays and holidays excepted), and to commence when ship is ready to discharge and notice thereof has been given by the captain in writing, and if detained over and above the said laying days, demurrage to be at 4d. a registered ton per day. This stipulation was duly inserted in the contracts of the claimant with the ships employed by him to transport the coal mentioned in the contract. It is not shown that the officers and agent of the Government, who were authorized to make, and did make the contracts thereafter, had knowledge or notice of such custom, nor that the contracts, or either of them, were made in view of that custom. In other words, it does not affirmatively appear by direct testimony, according to the finding of the court (III, p. 11) that the officers of the United States had knowledge or notice of the custom, or that the contracts were made in view thereof.

Finding V, pages 11, 12, sets forth in detail the arrival of the ships, and the dates thereof, at Honolulu, and gives the details as to the delays there encountered, and the other facts which are essential to the consideration of a claim for de-

murrage. The court also finds that "it does not appear that the defendant was at fault either in the loss of time in arriving at the wharf or in the discharge of the cargo afterwards. The court finds the defendant was able, ready, and willing to receive the cargo as rapidly as discharged at the wharf. The claimant paid to the ship-owner $1,053.36 for these delays."

A similar finding in effect was made by the court (top of p. 12) concerning the bark *Harvester* and the ship *General Gordon*, but there is some difference in the details. The court also finds that "in the case of each ship the defendant had notice in writing of their respective arrivals within twenty-four hours thereafter. The wharves at Honolulu are under the control of a harbor-master. The practice of such harbor-master was to assign ships to berths at the wharf in the order of their respective arrivals; and this practice was followed by him in respect to the ships mentioned." Then the court finds that the claimant paid the "ship-owners for delays $1,433.12 for the *Harvester* and $744.48 for the *General Gordon*. All coal delivered was paid for by the defendant."

The sixth finding (p. 12) is as follows:

"At the time of the delivery of the coal mentioned in the foregoing findings the Honolulu harbor had eleven docks or wharves, three of which only were used for the discharge of coal. The docks were crowded, and several vessels were moored at the reef. By local regulations of the Government, a harbor-master had general supervision of all vessels

in the harbor, and all vessels were anchored and assigned to berths, in the order of their arrival, by the harbor-master. There were no lighters for public use, and defendant had none at the port, and it was usual or customary to discharge freight upon the wharves. The defendant had no authority over the wharves, and was subject to local regulations and the order of the harbor-master, the same as individuals."

We have thus summarized and quoted from all the findings (pp. 7 to 12) that relate to the subject of the claims for demurrage.

The Law.

The court concluded (top of p. 13) that the claimant was not entitled to recover, and his petition was dismissed.

The majority opinion of the court below was written by Judge Wright (pp. 13 to 16). That opinion, as we think, contains a number of errors, which we will now endeavor to point out.

I.

Interpretation Against Party Who Wrote Contract.

The opinion wholly ignores the existence of the well-established rule that the words of an agreement will be taken most strongly against the party who prepares it, and any liberality of construction will be in favor of the party who simply signs it;

it will be construed most strongly against the party who uses the language.: *Garrison* vs. *U. S.*, 7 Wall., 688, 690; *Chambers* vs. *U. S.*, 24 C. Cls., 387, 392; *Simpson & Co.* vs. *U. S.*, 31 C. Cls., 217, 243; *Edgar & Thompson Works* vs. *U. S.*, 34 C. Cls., 205, 219.

In the last case cited Judge Weldon said (p. 219): "It is a most familiar principle of law that the words of an agreement are taken most strongly against the party who prepared it, and if any liberality of construction is to be indulged in it will be in favor of the party who simply signs, and not the party who signs and prepares the instrument for execution."

The findings of the court in the case at bar show that the contract was prepared by the officers of the United States, as we have seen, and therefore it follows that if doubt arises as to what interpretation should be put upon it, liberality of construction is to be indulged in favor of the petitioner. We think it will appear from a careful study of the majority opinion and of this brief that the court below acted upon the theory that there was no such rule of law.

II.

Custom of the Port of San Francisco.

The majority opinion of the court below challenged the soundness of the claimant's contention that the Government was bound by the custom at the port of San Francisco, relative to stipulations con-

tained in charter-parties, and consequently, in that regard, by the charter-parties also (see p. 8).

Finding III, p. 5, relates at length and with particularity what the custom was at San Francisco between shippers and ship-owners with reference to the insertion in their charter-parties of stipulations relating to the discharge of cargoes, notice of arrival of ships, lay days, etc., *and states that such "stipulation was duly inserted in the contracts of the claimant with the ships employed by him to transport the coal mentioned in the contract.*"

1. We submit that the existence of this custom operated so as to incorporate into the contracts between the claimant and the Government just such stipulations on the subjects above mentioned as were in fact inserted in the charter-parties between him and the ship-owners. In 2 Parsons on Contracts, side pp. 535-539, the learned author considers this subject and says:

"A custom which may be regarded as appropriate to the contract and comprehended by it, has often very great influence in the construction of its language. The general reason of this is obvious enough. If parties enter into a contract, by virtue whereof something is to be done by one or both, and this thing is often done in their neighborhood, or by persons of like occupation with themselves, and is always done in a certain way, it must be supposed that they intended it should be done in that way. The reason for this supposition is nearly the same as that for supposing that the common language which they use is to be taken in its common mean-

ing. And the rule that the meaning and intent of the parties govern, wherever this is possible, comes in and operates. Hence an established custom may add to a contract stipulations not contained in it, on the ground that the parties may be supposed to have had these stipulations in their minds as a part of their agreement when they put upon paper or expressed in words the other part of it. So custom may control and vary the meaning of words, giving even to such words as those of number a sense entirely different from that which they commonly bear, and which indeed by the rules of language, and in ordinary cases, would be expressed by another word.

This influence of custom was first admitted in reference to mercantile contracts. And, indeed, almost the whole of the law merchant, if it has not grown out of the custom sanctioned by courts and thus made law, has been very greatly modified in that way. For illustration of this, we may refer to the law of bills and notes, insurance, *and contracts of shipping generally.*"

In *Robinson* vs. *The United States*, 13 Wall., 363, 366, Mr. Justice Davis said: "Parties who contract on a subject-matter concerning which known usages prevail, by implication, incorporate them into their agreements, if nothing is said to the contrary."

Mr. Justice Blatchford, speaking for this court, cited *Robinson* vs. *The United States* in deciding the case of *Hostetter* vs. *Park*, 137 U. S., 30, 40, in support of this proposition: "It is well settled

that parties who contract on a subject-matter concerning which known usages prevail, incorporate such usages, by implication, into their agreements, if nothing is said to the contrary."

In *Houge* vs. *Woodruff*, 19 Fed. Rep., 136, 138, *Judge Brown said*: "*Where an established usage* has been proved, giving the merchant a right to, at least, one change of berth in the discharge of the cargo, he is not liable for the delay caused by the removal, because that is a part of the vessel's obligation. *Smith* vs. *60,000 Feet of Yellow Pine Lumber*, 2 Fed. Rep., 396, 400; *Moody* vs. *500,000 Laths*, Id., 607."

In *Pleasant* vs. *Pendleton*, 6 Rand. (Va.), 493, it was said: "An established usage * * * constitutes the common understanding of parties in their dealings; and on the foot of that common understanding, they are supposed to contract."

In *Barlow* vs. *Lambert*, 28 Ala., 704, it was said that customs are held as a part of the contract and are only binding because they are a part of it.

In *Foley* vs. *Mason*, 6 Md., 37, it was said that the theory of the law of usage rests upon the presumption that in certain transactions the parties did *not intend to expressly stipulate the whole contract by which they designed to be bound*, but that they intended to contract with reference to the known usage upon the subject, and that those usages were to be regarded as part of the contract.

In *Van Hoesen* vs. *Cameron*, 54 Mich., 609, it was held that parties contracting are supposed to do so with reference to the known usages and

customs which enter into and govern the subject-matter to which the contract relates, and all contracts made in the ordinary course of business, without particular stipulations to the contrary, are presumed to be made in reference to the usages and customs which exist.

In *McCulsky* vs. *Klosteman*, 20 Oregon, 108, it was said that in all contracts as to the subject-matter of which known usages prevail, the parties proceed on the tacit assumption of such usages, commonly reduce into writing the particulars of their agreement, but omit to specify those known usages which are included as of course by mutual understanding.

In *Lyon* vs. *Culbertson*, 83 Ill., 33, it was held that where there is a well-known usage which obtains in trade, it will be presumed that all who engage in that business, where it prevails, contract with a view to it, unless they exclude the presumption by their contract.

See, generally, on this subject Maclachlan on Merchant Shipping, 360, 361; Abbott on Shipping, 228; 1 Pars. Ship., 324.

2. The majority opinion of the court below then proceeds on the theory that, "by the plain terms of the contracts, the claimant had as effectually obligated himself to take the coal to the wharf as he had to cross the sea." We challenge the correctness of this view of the language used in the contracts. As we have heretofore shown, the language of the first contract is that the coal shall be

"delivered at the wharf," and that "deliveries on this contract shall commence on the arrival of the British ship *Euterpe* at Honolulu on or about the 23d day of July, 1898." The language of the second contract is that the coal shall be "delivered on wharf as customary," and that "deliveries on this contract shall commence with a cargo of about twenty-two hundred tons of coal, to arrive at Honolulu * * * on or about the first day of October, 1898."

We ask, who is to furnish the wharf? If the shipper is to do so, how is the Government to learn what wharf he has furnished? If the Government is to furnish it, how is the claimant to learn of the one chosen? Is it not natural and business-like that there should be some definite means of conveying notice or knowledge, and thus fixing responsibility? Is it not reasonable that the parties did not specify thus in the contracts because they knew the charter-parties between the claimant and the ship-owners would so specify?

Is the ship to be afloat or not? How is the consignee to be charged with the knowledge of the arrival of the ship at the port or the wharf? The contract, as written, contains no stipulation on that interesting subject, although it requires the coal to be inspected by an agent of the United States. That could only be done outside the ships. Is the Government to pay no fixed amount of demurrage if it should detain the ship? These are all matters of very great moment to the contracting parties, and yet there is nothing written in the contract on

these subjects. The reason why nothing was written in them on these most important subjects is very plain—the custom at San Francisco between shippers and ship-owners covered all of these topics and made that definite and certain which the written contracts sued on did not make definite and certain.

The court below does not pretend that there was any obligation on the claimant in the contracts in suit, except to take the coal to Honolulu and deliver it at the wharf for a certain price per ton about the dates named. This view makes these contracts the most narrow and the least consequential known to the books or to commerce. If cargoes could be carried in ships pursuant to contracts of that character only, it is safe to say that maritime freight rates would double instantly.

It is evident that the signatory parties were wiser than the majority opinion of the court below would have them be. In view of the fact that they did not write into the contracts anything at all on the very important subjects we have enumerated, it is apparent that they intended that the custom at the port of San Francisco should prevail and be binding upon them. In the absence of language to the contrary in the contract—and there is no such contrary language—it follows that these two contracts are to be interpreted by this court as if that custom had been incorporated in them in all its length and breadth.

The court below quotes from *Barnard* vs. *Kellogg*, 10 Wall., 390, in support of the theory that the whole subject-matter of the contracts was covered

by the written instruments in terms. We think no one would challenge the soundness of the views thus quoted. That case was before this court in *Robinson* vs. *U. S.*, 13 Wall., 363, 365, where Mr. Justice Davis said: "In *Barnard* vs. *Kellogg*. this court decided what proof of a custom or usage inconsistent with a contract and which either expressly or by necessary implication contradicts it, cannot be received in evidence to affect it; and that usage is not allowed to subvert the settled rules of law. But we stated at the same time that custom or usage was properly received to ascertain and explain the meaning and intentions of the parties to a contract, whether written or parol, the meaning of which could not be ascertained without the aid of such extrinsic evidence, and that such evidence was thus used on the theory that the parties knew of the existence of the custom or usage and contracted in reference to it. This latter rule is as well settled as the former, and under it the evidence was rightly received."

No language of ours could add to the force of the above quotation when turned against the position taken in the majority opinion of the court below.

We think that these authorities completely sustain our view that the custom at San Francisco was written into the contracts sued on by implication of the law.

III.

Knowledge of Custom.

The last sentence in Finding III, page 5, is to the effect that it does not appear that the officers and agents of the Government who made the contracts had knowledge or notice of the custom at San Francisco, nor that the contracts were made in view thereof. We submit that it is immaterial whether such officers and agents had that knowledge or not. In the case of *Hostetter* vs. *Park*, 137 U. S., 30, 40, this court, after speaking of a usage of the trade, said: "The same doctrine is applicable in the case of a bill of lading, *even though the usage be not known to the particular shipper*, if it be established as a general usage. *Phillips on Insurance*, secs. 980, 10003; *Thatcher* vs. *McCulloch*, Olcott, 365, 369, 370. *Lowry* vs. *Russell*, 8 Pick., 360, 362; *McMasters* vs. *Pennsylvania Railroad*, 60 Penn. St., 374; *Pittsburg Ins. Co.* vs. *Dravo*, 2 Phil., W. N. C., 194."

In this respect a custom is as binding on the parties to the contract as is the law of the land, which enters into every contract although not written there in words. Indeed the custom of a trade is as binding on those who engage in it as if it were that which is commonly known as the law of the land, of which one is not allowed to plead ignorance, unless provisions contrary to such custom are written into the body of the contract. The adoption of such custom is presumed, once it is shown to exist, unless the contrary appears, no

matter whether it be shown that the parties had knowledge of it or not.

In Maclachlan on Merchant Shipping, 361, it is said: "If the usages of a particular port are well known, at least in the trade to which the charter-party relates, it will be held, in the absence of exclusive words in it, to have been affirmed on the basis of such usages, *although to one of the contracting parties these usages at the time were unknown.*"

IV.

Conditions at Honolulu.

Near the end of Finding IV, page 6, it is said that "the wharves at Honolulu are under the control of a harbor-master. The practice of such harbor-master was to assign ships to berths at the wharves in the order of their respective arrivals, and this practice was followed by him in respect to the ships mentioned."

Finding VI. page 6, states that "the docks were crowded and several vessels were moored at the reef. By local regulations of the Government a harbor-master had general supervision of all vessels in the harbor, and all vessels were anchored and assigned to berths in the order of their arrival by the harbor-master. There were no lighters for public use and defendant had none at the port, and it was usual or customary to discharge freight upon the wharves. The defendant had no authority over the wharf and

was subject to local regulations and the order of the harbor-master the same as individuals."

These facts do not relieve the Government from liability.

1. The contracts sued on stipulated that deliveries should commence on the arrival of the ships or cargoes on or about certain dates named, and "at the rate of not less than one hundred tons per day." Such contracts fixed the period for discharge as certainly as if the number of days had been written therein.

The rule is that although the number of lay days may not be specified in the charter-party, yet, if they may be arrived at by reason of the rate of discharge having been fixed in the charter-party and the tonnage of the cargo being known, they must be treated as being as definite as if specifically stated.

In *Williams* vs. *Theobald*, 15 Fed. Rep., 468, it is said: "It is also settled that where the contract specifies a certain number of days for loading and unloading and provides that for any detention beyond the lay days demurrage is to be paid at a fixed rate per day, the shipper is held very strictly to its terms, neither a municipal regulation of the port prohibiting the unloading for a limited period, nor delay occasioned by frost, tempest, or by the crowded state of the docks will relieve him from the payment of demurrage. *Randall* vs. *Lynch*, 2 Camp. (N. P.), 352."

In that case, on p. 471, it is also said: "Although the charter-party in the present case does not specify a certain number of lay days, at the expiration of which demurrage is to run, it indicates the rate at which the discharge, when commenced, shall be effected." * * * "The cargo actually delivered at San Francisco was 1,808 tons. Divide this by 100, the lowest number of tons to be secured daily, and we have 19 working days for the period within which the cargo was to be discharged; and this period is fixed with as much certainty as though 19 working days had been originally written in the charter-party as the number of lay days."

2. The parties having contracted in such a way as to fix the rate of discharge, it follows inevitably that local conditions at Honolulu could not relieve them from such contract stipulations.

The general rule is that if the shipper or freighter covenants to do a particular act, which it becomes impracticable for him to do, he must answer for his default. *Cross* vs. *Beard*, 26 N. Y., 85; *Abbott on Shipping*, 307, 387; *Ford* vs. *Cotesworth*, L. R., 4 Q. B., 127; *Williams* vs. *Theobald*, 8 Sawyer, 443, 448; *Allen* vs. *385 Tons of Coal*, 27 Fed. Rep., 316.

Where the contract specifies a certain number of days for loading and unloading, and provides that for any detention beyond the lay days demurrage is to be paid at a fixed rate per day, the shipper is held very strictly to its terms; neither a municipal regulation of the port prohibiting the unloading

for a limited period nor delay occasioned by frost, tempest, or the *crowded state of the dock* will relieve him from the payment of demurrage. *Randall* vs. *Lynch*, 2 Camp., N. P., 352; *Williams* vs. *Theobald*, 15 Fed. Rep., 468.

In 9 Am. and Eng. Ency. of Law, second edition, page 223, it is said: "When demurrage is expressly provided for in the charter-party or bill of lading, the liability of the charterer or freighter is determined strictly by the terms of the contract. If he detains the vessel beyond the lay days he becomes absolutely liable to pay the stipulated demurrage without regard to the cause of the delay, unless he is excused by the terms of the contract, or unless the delay was due to the fault of the ship-owner or his agents. He is liable for delay at the port of discharge as well as at the port of loading, and it can make no difference that consignees have also become responsible."

And on page 242 of the same volume it is said: "As was stated at the beginning of this section, when the charter-party or bill of lading expressly stipulates that the vessel shall be loaded or unloaded in a certain time, or at a certain rate, the contract is strictly enforced according to its terms. Nothing whatever, other than the fault of the ship-owner or his agent, will excuse detention of the vessel beyond the time specified, unless it is so provided in the contract. Thus it has repeatedly been held that the ship-owner is entitled to recover demurrage according to the terms of the contract, or damages in the nature of demurrage, for deten-

tion of the vessel beyond the time specified in the contract, though the delay was caused by the fault of third persons over whom the charterer, freighter, or consignee had no control."

3. But even if there were no contract at all concerning lay days or demurrage, the law will imply a contract that the ship shall be detained a reasonable time only, and that the ship shall have reasonable demurrage therefor.

In Maclachlan on Merchant Shipping, p. 546, the learned author says: "But if it is omitted to ascertain the lay days, the law implies a stipulation for a reasonable time considered with reference to the trade and the port the vessel is in. * * * The law will then imply, it may be, a contract or covenant not to detain the ship longer than such reasonable or fixed time for loading or discharging, or longer than the time fixed for demurrage, entitling the owner to reasonable damages for such detention, notwithstanding it be occasioned by the crowded state of the docks, the state of the weather, * * * in fact, whenever the detention is not attributable to the ship-owner or his agent."

Numerous cases are cited in the notes in support of this text. Again, on page 243 of the same volume, speaking of the ship-owner, it is said: "And he is entitled to recover where the delay was caused by the acts of the Government or by officers at the port of loading or discharging, as the case may be, provided it is not due to his own fault or to that of his agents. The same is true where the delay was

caused by an accumulation of vessels at the dock, making it necessary for the vessel to await its turn."

The notes to the text quoted show that the act of the custom-house officers in unlawfully seizing a vessel, the enforcement of quarantine regulations, and the closing of a port by order of the Government, constitute no defense against claims for demurrage by the ship-owners.

On page 244 of the same volume it is said: "Since no cause other than the fault of the ship-owner or his agent will excuse detention of the vessel beyond the time fixed by the contract, unless there is an express exception, it is usual for charter-parties and bills of lading to except certain causes."

The text-books all state these rules of law. 1 Pars. Mar. Law, 152; 1 Leggett on Bills of Lading, 297–300.

Here the contract sued on contained no exceptions whatever for the relief or the protection of the Government.

4. It will be remembered that Article I of each contract obligates the claimant to deliver the coal, "dangers of the sea and any causes beyond their control excepted." The court below paid no attention to this language.

In 9 Am. and Eng. Ency. of Law, p. 246, it is said: "Often the contract expressly excepts delay not caused by the 'fault' or 'default' of the charterer, freighter, or consignee, or that is due to

'causes beyond his control.' Under such a contract he is generally not liable for delay from causes beyond his control that act directly to retard the loading or discharge."

Such stipulations in the contracts sued on would relieve the claimant from liability because of the acts set forth in the findings above referred to, if any such demand should be made against him. The officers of the Government who prepared the contracts thus furnished the claimant with ample protection, but they did not provide the Government therewith. The absence of such relieving or preventive language is significant, for it makes apparent the intent of the contracting parties that the Government was not to be relieved by such conditions as those set out in the findings of fact.

V.

Getting Wharf at Honolulu.

The court below held that the contract obligations to deliver at the wharf put on the claimant the burden of getting the wharf in Honolulu. We submit that this is not the law.

1. The letters which the claimant and the Government officers wrote agreed that the coals should be "delivered at Honolulu," at a certain price, and a wharf was not referred to therein. The agreement was for delivery at Honolulu generally. The contract prepared by the officers of the Government obligated the claimant to deliver "at the wharf,"

but no wharf was named therein. The officers who prepared it went no farther than to make the contract stipulate a "wharf," thus excluding "ships" and "lighters." They changed the original agreement that much only. The court below found, as a matter of fact, that there were *three wharves* at which coal was unloaded during the periods fixed for the performance of the contracts. Government was entitled to inspect the coal on the wharf before receiving it. 1 Parsons on Ship. 226; Porter on Bills of Lad., 400, 401; Maclachlan on Ship. 369. We submit that these contracts cast on the Government the duty of furnishing or designating the wharf at which it would inspect and receive the coal. The Government had the right, in preparing the contracts, to stipulate that the coal should be delivered at a wharf, or on ships, or on lighters. If the contracts had required that the coal should be delivered on ships or on lighters, would it be contended by the Government that the contracts cast on the claimant the burden of selecting the ships or the lighters? Certainly not. Then why should the contracts be so interpreted as to put on the claimant the burden of selecting or designating the wharf? It stands to reason that the party who is to inspect and receive the coal should designate in the contract, or otherwise, the wharf at which he will receive it, in order that there may be certainty of contract and liability, as well as full protection to him. The officers who prepared the contract would have added the words "to be selected by

J. J. Moore & Co." if they had desired or intended an engagement of that kind. As no particular wharf was named in the contract, the only reasonable inference is that the parties intended that the Government should designate the wharf on the arrival of the ship, and that this designation should be binding upon both parties.

That this is the reasonable interpretation of the contracts is established by the scarcity of authorities on the subject. We have been able to find but few cases in which the question arose, even indirectly; a fact evidently due to the knowledge and practice of the commercial world, that where a wharf, or lighter, or ship of discharge is not named in the contract, the consignee is bound to designate one before receiving the cargo, in the absence of plain language to the contrary.

There is decided commercial advantage in this also. The consignee has the right to assign such contracts, and thus pass the title to the coals to another party, and that party might prefer a wharf which would not have been chosen by the consignee or the ship-owner.

2. Of course this power must be used justly and reasonably.

In Oliver on Shipping, 77, it is said: "A consignee, however, has not a right to order the ship to discharge at any place, excepting the usual and customary places of discharge in the port, unless otherwise stipulated in the charter."

The dispute between the charterer and the con-

signee on a question which relates to the designation of a wharf is analagous, in legal effect, to one between the ship and the charterer on a question of that kind. "Where there are several usual places of loading," says Scrutton on Charter-Parties, 90, 91, "the charterer, not the owner, is entitled to decide what the ship shall do, and has a reasonable time allowed for that decision; but he must choose a berth that is free or to be free in a reasonable time."

On page 92 the author says: "If the charterer will not name a wharf or dock, where none is named in the charter, and there is more than one in the port, he will be liable for any damages occasioned by the delay." * * *

In *Stewart* vs. *Rogerson*, 6 L. R. Com. Pleas, 424, the ship brought an action against the charterer to recover freight and demurrage, pursuant to a charter-party which obligated the ship to "proceed to London and there deliver the same at a good and safe wharf to the freighter or assignees." The ship arrived and the captain was ready to take the vessel to a safe wharf, if one had been named by the consignees, but the consignees "were not only not ready and willing to name a wharf, but positively refused to do so." The court held that the consignees should have named a wharf.

In *Jacques & Co.* vs. *Wilson*, 7 Times Law Rep., 119, the charter-party provided that the ship should load a cargo of timber "and proceed to London, or so near thereto as she might safely get, and deliver same, always afloat." When the ship arrived at

Gravesend, it was ordered to proceed to the Surrey Commercial Dock and there discharge, but it could not do so because that dock was already full of shipping. The court held the ship-owners entitled to demurrage because the charterers had not given proper directions, as it was "their duty to send the ship to some place where she could discharge her cargo."

These cases pass on contract stipulations which are similar in legal affect to those before the court. The rule of law established by these cases is that where the ship is to proceed to a certain port and deliver the cargo "at a wharf," the obligation is on the charterer to select the wharf, or, at least, that he has an option so to do. Having that option, his obligation is the same as if the contracts had read that the cargo should be delivered at a wharf to be named by the charterer.

A case on a contract of that kind is *Tharsis Co.* vs. *Morrell*, Law Rep., 2 Queen's Bench (1891), p. 647. One of the opinions in that case was written by the eminent Lord Justice Bowen, who says, on page 652: "The option is given for the benefit of the person who is to exercise it. * * * The option is to choose a berth or port or dock, that is one that is reasonably fit for the purpose of delivery. * * * The most that can be said is that the charterer does not exercise his option at all unless he choses a berth that is free or likely to be so in a reasonable time."

"But in the absence of an express agreement," says Prof. Parsons, in his work on Shipping,

volume 1, page 311, "there is an implied contract that the owner or consignee of the goods will provide for discharging them in a reasonable time; and it has been held that this time is for the jury to ascertain upon the consideration of all the circumstances."

In Porter on Bills of Lading, sec. 403, it is said: "If no wharf is designated and there are two or more wharves in the port equally convenient to the carrier, he is bound to deliver at the one most convenient to the consignee or his assigns."

The author cites as his authority for this proposition of law, *The Boston*, 1 Lowell, 464, where the contract required delivery at Boston to Bosworth & Hamlin, or their assigns. The consignees assigned the cargo to another party and notified the master of the ship that she should not deliver the coal at their wharf, but should proceed to the assignees, which he did, and they ordered him to discharge at the wharf of Cook, Jordan & Morse, and this the master refused to do. After some days of negotiation the master landed his cargo at the wharf to which he had first come, to be held subject to the orders of the assignees, on their paying freight, demurrage, and other charges. The assignees then proceeded in the United States court as libellants for the non-delivery of the cargo. The claimants insisted that the master might deliver his cargo at any suitable wharf, with notice to the consignee or his assignee, and thus fully meet the requirements of his contract, and that the wharf at which the cargo was delivered was suitable. Judge Lowell

said: "There is no evidence of what is usual or suitable in respect to cargoes of coal, but, considering the heavy nature of the cargo, which makes its transportation on land very costly, I am led to doubt whether a usage to land such a cargo at a distance from the owner's wharf could be considered reasonable. In the absence of evidence of usage, I lay down the rule of law, as I did in another case, that when there are two or more wharves in the port equally distant to the carrier, he is bound to deliver at that most convenient to the shipper; at least if he be duly and reasonably notified of such preference. And where one shipper or consignee owns the whole cargo, he has, in my opinion, the same right that the charterer would have to say where the vessel shall discharge, it being of course a suitable place and within the limits of the port."

In that case there was such a stipulation as is set forth in the charter-parties in the case at bar, persuant to the custom of the port at San Francisco, that there should be notice to the consignee of the arrival of the ship in port, and that the vessel should be discharged at the rate of one hundred tons per day, after which the consignee should pay demurrage. Speaking of this feature of the case, Judge Lowell said, on p. 466: "I have more than once construed this new demurrage clause to mean that the owner of the coal is to have twenty-four hours after the notice of the ship's arrival in which to find a berth for her discharge. This construction has not only been acquiesced in, but is insisted on by the ship-owners."

And on p. 467 he said: "It was the duty, then, of the master to deliver at the wharf of Cook, Jordan & Morse, according to the order given him by the libellants, within twenty-four hours after notice of his arrival, and, indeed, at the very time when, in accordance with his contract, he reported to them his arrival."

Because the master of the ship had not properly responded to the directions given by the consignees the decree was in favor of the libellants.

In the case of *Manson* vs. *N. Y., N. H. & H. R. Co.*, 26 Fed. Rep., 923, the contract was that the schooner should deliver 980 tons of coal to the railroad company, "at the consolidated road docks, New Haven, for a specified freight." The bill of lading contained a demurrage stipulation similar to the stipulation on that subject in the charter-parties in the case at bar. The schooner arrived at New Haven harbor and on the following day reported to the agent of the consignee. The consignee owned three docks close to each other, at which coal was delivered, on one of which there were special facilities for handling coal. The schooner lay at the mouth of the channel until February 15, as the result of various causes and conditions, and she commenced discharging the next day. Demurrage was claimed for ten days, and a decree for that amount was entered. On page 926 Judge Shipman said: "Under the terms of the bill of lading the *Sutton* was obliged to discharge at that one of the docks of the consignee which the latter might designate, provided the

designated dock was accessible, by the use of reasonable means by the ship-owner, within a reasonable time. *Nelson* vs. *Dahl*, 12 Ch. Div., 568. The selection of the place of discharge was with the consignee, and the ship-owner was obliged to use reasonable means to reach it. * * *"

This case was appealed to the Circuit Court, where the opinion was written by Judge Wallace and the decree of the District Court was affirmed. The opinion is reported in 31 Fed. Rep., 297. Judge Wallace said, on page 299: "The place of discharge designated in this bill of lading was any one of the several docks of the cónsignee, known as the Consolidated Road Docks, and there was no proof of any usage or custom by which any particular one of these docks was to be treated as the place of discharge. Under this bill of lading, the consignee had the right, and it was its duty, to designate a suitable place for the discharge of the cargo within twenty-four hours after notice of the ship's arrival. This follows not merely from the fact that delivery of the cargo was to be made at any one of several docks belonging to the consignee, all of which ordinarily were equally convenient, or practically so, for the carrier; but because the peculiar phraseology of the demurrage clause implies that the parties to the bill of lading intended that the consignee should have twenty-four hours in which to select a suitable place of discharge after notice of arrival of the ship. *The Boston*, 1 Low. Dec., 464. The bill of lading prescribes what time is to be deemed a

reasonable time on the part of the consignee in which to provide a suitable place for the discharge of the cargo, and exonerates him from liability for any delay occurring during that period without his fault; but it also imports a promise on his part that the running days in which the vessel is to be discharged shall commence at the expiration of the twenty-four hours. *Choate* vs. *Meredith*, 1 Holmes, 500. Any detention of the ship from that time, which occurs without the fault of the carrier, is at the risk of the consignee."

In *Moody* vs. *500,000 Laths*, 2 Fed. Rep., 607, the charter provided that the schooner should "proceed to Point Wolf, N. B., and there load from the charterers a full cargo of laths, and, being so loaded, should proceed therewith to New York and deliver the same; cargo to be delivered within reach of the vessel's tackles, with all possible dispatch, at Point Wolf, and be taken delivery of in like manner." Judge Benedict said: "By this provision the charterers assumed an obligation to designate an unencumbered berth for the loading and discharge of the cargo (*Davis* vs. *Wallace*, 3 Clifford, 133; *Thatcher* vs. *Boston Gas Light Co.*, 2 Lowell, 362), and to furnish cargo at the place of loading as fast as it might be possible for the vessel to receive it."

In *Smith* vs. *Lee*, 66 Fed. Rep., 344, there was a bill of lading which required the ship-owner to deliver coal at the "port of Cambridgeport." The bill of lading contained the usual stipulations as to notice of arrival, lay days, and demurrage. When

the ship arrived at Cambridgeport her master gave notice of arrival and was directed by the consignee to proceed to his own wharf for discharge of cargo. Delays occurred, and in the effort to take the ship to the wharf which had been designated, she ran aground and was not able to reach it. In passing on the questions involved the court said: "The appellants contend that, in view of the fact that the consignee, Smith, owned and carried on his business in a coal wharf in the designated port of delivery, the contract must be construed to be the same as if it had contained an express understanding to deliver at that wharf. We cannot so construe it. The delivery by the bill of lading was to be made to Smith or his assignee. It was therefore in the power of Smith, by endorsement of the bill of lading, to transfer the coal to another, who would then have the right to select a proper place of discharge within the designated port. Upon assignment of the bill of lading, the master would not have been sustained in refusing to comply with the order of the assignee, and insisting, against his will, to discharge at the wharf of Smith. Under this bill of lading an assignee would have the same right of directing where the cargo should be unladen as if mentioned in it by name. In signing it the master would rightly understand that the special place of discharge at his port of destination was undetermined, and would depend on the choice of whosoever might have control of the cargo on its arrival."

In *P. & R. R. R. Co.* vs. *Northam*, 2 Benedict, 1,

the bill of lading described the boat as "bound for Catharine Street, East River, New York," and Blatchford, J., said: "In regard to No. 58, she was bound by the contract to go to Catharine Street. She went there and was then ordered by the respondent to go to Dover Street, and she then went there. Undoubtedly the respondent ordered her to the place where he thought she could be most quickly discharged, but, by the contract, the whole duty of the libellants was discharged in taking the cargo to Catherine Street and notifying the respondent of its arrival and awaiting his orders. This was done."

Decree for libellants for demurrage.

So, in the case at bar, the contract was to take the coals to Honolulu and deliver them at a wharf, which was not named. The claimant discharged his duty by taking the cargoes to Honolulu and notifying the Government of their arrival. It was then incumbent on the Government to designate the wharf at which it would inspect and receive the coal.

In *Reed* vs. *Weld*, 6 Fed. Rep., 304, the libellant contracted to deliver the coal to the respondents, "above three bridges, South End, Boston." When the ship was about to pass the first bridge she was stopped by an order from the respondents to report to them before going through the bridges. The captain went ashore and reported and, on the next day, the respondents sold the coal, and it was agreed that it should be delivered at Warren's wharf above seven bridges. Delays were encountered and de-

murrage was claimed. The court, on the theory that the respondents had the right to designate the place of delivery, held the libellant entitled to demurrage, and a decree was entered accordingly.

So, in the case at bar, the obligation was on the Government to designate the wharf, and the appellant is entitled to the demurrage which he had to pay to the ship-owners because the Government did not meet its obligation.

VI.

Government Should Have Directed Other Delivery.

If the wharves were all occupied on account of a congestion of business, or if they could not be used for any other reason, the claimant had the right to demand demurrage for the time lost in waiting for the Government to take the coal. The Government might have received it on other ships, or on lighters, or on barges, and if it had directed the coals to be delivered on other ships, or lighters, or barges, the claimant would have been obliged to deliver them there or have been deprived of the right to demurrage.

In *Williams* vs. *Theobald*, 8 Sawyer, 443, 448, the court said: "It appears to be well settled in England that where, by the charter-party, the ship is to be brought to a particular dock, or as near thereto as she can safely go, and she is prevented from getting to her primary destination by any perma-

nent obstacle other than an accident of navigation, the ship-owner is entitled to damages for the detention by reason of the charterer's refusal to receive the cargo at the alternative place of delivery, although the obstacle which prevented her from getting into the docks (viz., their crowded state) was not an obstacle endangering her safety. *Nelson* vs. *Dahl*, 12 L. R., Ch. Dw., 568; *Ford* vs. *Colesworth*, L. R., 4 Q. B., 127; *Cross* vs. *Beard*, 26 N. Y., 85."

In *Allen* vs. *785 Tons of Coal*, 27 Fed. Rep., 316, the bill of lading provided that the consignee should receive the coal at New York, "from alongside the ship, not above East River bridge, at a wharf designated by them." The consignee was notified of the arrival of the ship and he designated the foot of Fourteenth street as the place selected for the landing of the coal. The place thus designated was not in conformity with the charter, nor could it be reached in safety, and it was therefore rejected and the cargo of coal was discharged at Boston wharf, *the consignee not having sent lighters to remove it from alongside the ship.*

The court held that the ship had the right to suppose that the consignee would send lighters to take the coal, or designate some other suitable place for the discharge of the cargo. By so doing the consignee would have received his coal without delay to the ship. Judgment was rendered for libellant on the demand for demurrage.

VII.

Reasonable Time to Unload is Implied.

Even if it should be held that the custom of the port of San Francisco to write such charter-parties as are described in the findings of the court below did not become a part of the contract between the parties to the case at bar, still the appellant is entitled to relief.

1. In the absence of any express agreement as to the time for unloading, the law implies a contract to unload within a reasonable time, and if the charterer or consignee fails to do so, through his own fault or that of his agent, he is liable for damages in the nature of demurrage for the detention of the vessel. The rule is stated and numerous authorities are cited in 9 Am. & Eng. Ency of Law, page 253, note 3.

We will consider some of the American cases: *Melloy* vs. *Lehigh Co.*, 37 Fed. Rep., 377, was libel for damages in the nature of demurrage for the detention of two canal boats, by not having loaded them in time. Kurtz, Cook & Co., having purchased coal of the Lehigh Co., deliverable at Port Johnson, drew an order on their superintendent at New York, directing them to deliver the coal to Buchanan Bros. It was stipulated on the back of the order that "no liability for demurrage or other cause is to be incurred by J. D. Kurtz, Cook & Co., or by the cargo, or the consignees thereof, for delay in loading, such delay to be borne by the vessel."

When the order was presented at the office of the Lehigh Company in New York it was stamped as follows: "Accepted subject to the following conditions: The vessel receiving this order is to conform to the directions of the company's shipping agent at the point to which she is sent. No liability is to be incurred for delay, or failure in furnishing a load to the vessel."

There was delay in loading the boats, which was caused by not loading them "in turn," as provided by the order and by the custom of that shipping point.

It would be difficult to imagine a stronger case for the Government on the theory advanced by the majority opinion of the court below than the case we are here considering. In disposing of this question (p. 378) Judge Brown said: "It is contended on behalf of the respondents that on such orders no direct action will lie by the master of the vessel detained for lack of privity of contract, because the respondents' contracts in such cases, it is said, are solely with the drawers of the orders—*i. e.*, the vendees of the coal. The right of a vessel to damages for detention, however, need not rest on express contract. The maritime law makes it the duty of the freighter, or of the owner, or consignee of goods, who undertakes to load or to discharge the ship, to do so with reasonable promptness, and it imposes on him a liability for the damages from detention arising from his negligence or unjustifiable delay. At common law an action of trespass on the case would lie for this breach of duty. *Sprague* vs.

West, Abb. Adm., 548, 553; *Bacon* vs. *Transportation Co.*, 3 Fed. Rep., 344; *Hawgood* vs. *Tons of Coal*, 21 Fed. Rep., 681."

And again on page 379 the court said: "The respondents, therefore, were not only bound under their ordinary maritime duty as freighters to load the vessel without unreasonable delay—that is, in this case, according to the express contract with the drawer—but the implied contract created the same obligation. Upon either ground the vessel has a direct remedy against the freighter, just as she has a direct remedy against any owner of cargo that is bound to unload her, and who has induced her to submit to his direction. *Sprague* vs. *West*, *supra*; *Railroad Co.* vs. *Northam*, 2 Ben., 1; *Crawford* vs. *Mellor*, 1 Fed. Rep., 638; *Houge* vs. *Woodruff*, 19 Fed. Rep., 136, 137, and cases there cited."

In *The Hyperion's Cargo*, 2 Lowell, 93, demurrage was not expressly stipulated for in the bill of lading, but Judge Lowell held that an ordinary bill of lading implied an agreement that the cargo shall be received within a reasonable time after the arrival of the vessel at her port of destination, and that as the cargo had not been received in that time the libellants were entitled to a decree for demurrage.

In the *Z. L. Adams*, 26 Fed. Rep., 655, the action was for damages in the nature of demurrage for delay in unloading the schooner, and Judge Brown said: "As the bill of lading fixed no period for the discharge of the cargo, the only obligation of the consignee or his vendee was to use due dilligence

in procuring a berth and to discharge, according to the custom of the trade."

The vendee or the consignee in that case, not having used such dilligence, damages in the nature of demurrage were decreed.

In *Bacon* vs. *E. & W. T. Co.*, McKennon, C. J., of the Circuit Court, said: "An express stipulation for demurrage in a contract of affreightment is not necessary to entitle the owner of a vessel to compensation for her unnecessary or improper detention in loading or unloading. Reasonable promptness in delivering a cargo at its point of shipment, and in receiving it at its destination, is a duty implied in such contracts, and for a violation of it, damages in the nature of demurrage are recoverable. This is too well settled, both in England and in this country, to need discussion or authorities."

On page 346, the court quotes with approval the language of Chief Justice Denio, in *Cross* vs. *Beard*, 26 N. Y., 85, 89, 91, where, after speaking of the effect of the agreement for demurrage in the charter-party, he said: "But the rule is somewhat different when no period of delay is fixed by the contract. There a reasonable time is implied, and this is to be determined upon by a regard to all the circumstances legitimately bearing upon the case, and it is a question for the jury."

Where the charter or bill of lading is silent as to the time of unloading and discharge, there is an implied contract to discharge the vessel within a reasonable time. *Empire Co.* vs. *P. &*

R. Co., 77 Fed. Rep., 919, affirming 70 Fed. Rep., 268. Numerous authorities are cited in these opinions. To the same effect are *Randall* vs. *Sprigg*, 74 Fed. Rep., 247, and *Hoxsie* vs. *Reuben Doub*, 46 Fed. Rep., 800.

Thus we see the duty to load or discharge the ship with reasonable promptness is cast on the freighter, or the consignee, or the owner of the cargo, and it imposes on him a consequent liability for the damages from the detention of the ship, for which there is a direct remedy against the freighter, or consignee, or the owner of the cargo. In the case at bar the Government is both the consignee and the owner of the cargo.

2. The same rule applies where the liability is *in personam*, or *in rem*, and it is settled that a contract will be implied on the part of the consignee or his assignee to unload within a reasonable time, when no time is specified in the contract, and a libel *in personam* or *in rem* may be maintained against him for damages for breach of such implied contract. This doctrine is stated and numerous cases cited in 9 Am. and Eng. Ency. of Law, p. 255, notes 3, 4, and 5.

VIII.

Acceptance of the Cargoes.

That the Government, having accepted the cargoes as consignee, is liable in the case at bar the same as if it had been the charterer, or a party to a bill of

lading, is clearly established by the authorities, we think. In 1 Parsons on Shipping, 312, it is said: "If it is said in the bill of lading that demurrage is to be paid, the reception of the goods by the party, under such a bill, would be evidence of an agreement on his part to pay the prescribed demurrage; without this clause in the bill, however, there is no claim on the consignee for demurrage as such, although there may be a claim for damages caused by the delay."

It is well settled by the decisions of the courts that the acceptance of a cargo without objection, under the charter-party or bill of lading, imports an agreement to pay demurrage according to its terms.

The question arose in *Sutton* vs. *Housatonic R. Co.*, 45 Fed. Rep., 507, where the bill of lading provided for demurrage, and Judge Brown held that the acceptance of the cargo without objection imported an agreement to pay the demurrage, and he entered a decree accordingly. Judge Brown cited *North German Lloyd* vs. *Heule*, 44 Fed. Rep., 100, and *Neilson* vs. *Jesup*, 30 Fed. Rep., 138.

In *Neilson* vs. *Jesup*, 30 Fed. Rep., 138, it was held that the vessel, in delivering cargo, was not bound to look beyond the owner of the cargo. As he has the control of the delivery and acceptance of the goods, he is responsible, *on accepting the goods under bill of lading*, for freight and demurrage according to its terms. In the court's opinion it is said: "The general rule undoubtedly is that the consignee and endorsee of the bill of lading,

who is owner of the goods and of the bill of lading, and who accepts the goods under the bill of lading, is bound by its terms. If he accepts the goods under the bill of lading, he is presumed to agree to pay the stipulated freight, and to receive the goods within a reasonable time, or within the agreed time, or else pay what the bill of lading requires for the delay." * * * "The vessel is not bound to look beyond the owner and holder of the bill of lading, because he has the right to control the delivery and the acceptance of the goods under it. (*The Thames*, 14 Wall., 98, 107.) For any unreasonable delay in the acceptance of the goods and in enabling the ship to deliver, he is, therefore, primarily responsible. To avoid this responsibility, he must either refuse acceptance or find some other person who, both as vendee of the goods and as assignee and holder of the bill of lading, becomes substituted in his place and to his rights and liabilities, through direct relations with the ship, under and by virtue of the bill of lading."

The consignee of cargo and holder of the bill of lading, even though he is but an agent to sell, is liable for both freight and demurrage. *Gates* vs. *Ryan*, 37 Fed. Rep., 154, opinion by Judge Brown, citing several authorities,

IX.

Liability of the Government.

We think that the authorities clearly establish our view that the Government is liable as consignee for the demurrage paid by the charterer to the ship-owner.

1. We shall review some of the authorities, and we begin with directing the attention of the court to the fact that the Treasury Department, in the opinion of the Comptroller of the Treasury, dated December 15, 1898, 5 Decs. of the Comptroller, 305, held the United States liable for demurrage in a case of the same character. There, William Lamb & Co. claimed demurrage for detention of the schooner *Rebecca J. Moulton*, on a contract entered into with the United States, whereby William Lamb & Co. agreed to ship certain coal for the Government from Norfolk to Key West. In accordance with this contract, William Lamb & Co. forwarded 843 tons of coal on the *Rebecca J. Moulton*, "consigned to the United States Navy, Key West, Fla."

The bill of lading was endorsed by the master of the vessel to J. H. Conant & Co., which firm, we infer from the opinion, owned the schooner. J. H. Conant & Co. endorsed the bill of lading to William Lamb & Co. That endorsement, so the Comptroller held, operated as a waiver of any claim which the master or the owners of the vessel might have against the Government under the bill

of lading. Thus the Comptroller disposed of the master and the owners of the vessel, and narrowed the question of legal right to William Lamb & Co., on the one side, and the Government on the other.

So, in the case at bar, the ship-owners demanded and received demurrage from the charterer or shipper, who is the appellant here, and left him, as he had contracted with the Government, to his rights under the law.

In the case before the Comptroller, it was held that J. H. Lamb & Co., the charterers or shippers of the coal, had the right to recover the demurrage from the United States, the consignee in that transaction. William Lamb & Co., like the appellant here, dealt with two parties, the ship-owners and the Government. In that case, like the one at bar, the ship-owner collected demurrage from the shipper, and the latter made demand therefor on the consignee.

As the Comptroller allowed the claim for the demurrage, it is quite safe to assume that it was paid by the Government. The case is exactly similar ,on the point of liability of the Government, to the case at bar, and it furnishes a practical interpretation of the contracts and the law that is entitled to the serious consideration of this court, as we believe.

2. In *Cranford* vs. *Mellor*, 1 Fed. Rep., 637, there was libel by the owners of the barge to recover damages for detention, although the bill of lading contained no stipulation for demurrage, and

Judge Butler held that the owner of the cargo who delays unloading it after the vessel arrives at the designated wharf, is liable to the owners of the vessel and for damages for its detention, although, by the terms of his purchase of the cargo, *the vessel was employed and the freight paid by the shipper.*

That is exactly the case at bar. Here the Government bought the coal from the appellant, to be delivered at a wharf in Honolulu. The appellant chartered the ship and paid the freight, or the cost of the charter.

Among other things, Judge Butler said in that case: "The difficulty respecting privity between the parties disappears when the ownership of the coal is traced to the respondents. The law implies a contract from the relations of the parties, growing out of the transaction." He cited a number of authorities in support of this proposition of law.

In that case, the owners of the ship could have proceeded against Bright, Thomas & Co., who contracted for the delivery of the coal with which the ship was laden, but instead of that they proceeded against Mellor & Rittenhouse, who had purchased the coal, and a decree was entered in their favor, because the law implied a contract between the ship and the owners of the cargo, Mellor & Rittenhouse.

In *275 Tons of Mineral Phosphates*, 9 Fed. Rep., 209, the action was *in rem* to enforce a lien on a quantity of mineral phosphate lately on board the brig *Dauntless*, for delay in removing the same from the brig aforesaid, and Judge Benedict said: "The claimants were no parties to the contract of

affreightment under which the property had been transported, if such a contract there was, but simply purchasers of the property as it lay in the vessel." * * * "And as, in the eye of the law maritime, upon commercial reasons, the master of the ship is deemed to contract, in respect to the freight, rather with the merchandise than with the shipper, and his rights are, therefore, not made to depend upon any doctrine of agency. *Hyperion's Cargo*, 2 Low. 94. So, upon the same grounds, the contract to remove this merchandise—which merchandise, it must be remembered, was the cargo of the brig actually on board as such—should be deemed to have been made with the merchandise as well as with the buyers thereof, and the merchandise in consequence is chargeable with the loss arising from the non-performance of that contract." Decree for libellants.

So, in the case at bar, the contract, in the eye of the law maritime, must be deemed to have been made with the merchandise as well as with the buyers thereof.

In *Young* vs. *140,000 Hard Brick*, 78 Fed. Rep., 149, it is held that the implied obligation to unload within a reasonable time is not limited to the shipper and the assignee, but extends to purchasers of the cargo, even when there is no assignment of the bill of lading.

In *Falkenburg* vs. *Clark*, 11 R. I., 278, 283, the court said: "For while it is held in many cases that the demurrage cannot be recovered on a special count for demurrage, unless there is a special pro-

vision for demurrage, it is well settled by the more modern cases that the consignee will yet be held liable in a proper action for any delay caused by himself. *Abbott on Shipping*, 306; 1 *Kay on Shipmaster & Seaman*, 151; *Cross* vs. *Beard*, 26 N. Y., 85; *Morse* vs. *Peasant*, 2 Keyes, 16; *Ford* vs. *Cotesworth*, L. R., 4 Q. B., 127, 136."

As far back as *Jesson* vs. *Solly*, 4 Taunton, 52, decided June 29, 1811, it was a new thing to bring an action against the consignee on the general count in assumpsit for demurrage, but Lord Mansfield held "that if the consignee would take goods, he adopts the contract."

Heath, J., said: "It is clear the plaintiff is entitled to demurrage, either from the consignor or consignee."

Chambers, J., said: "It would be monstrous, if the consignee, accepting the contract with knowledge of the terms, should not be bound by it and could send the captain back to the consignor for demurrage."

So, in the case before this court, the vessel-owner might have proceeded against the consignee for demurrage, but he preferred to get it from the charterer, although it was the consignee who was in fault. The ship-owner collected the money from the charterer and it is that damage which the charterer is here endeavoring to collect from the consignee. The charterer paid that which he was obliged to pay through the fault of the consignee, pursuant to the terms of the charter and the provisions of the law. As it was the act of the

consignee which caused him that loss, he has the right to proceed against the latter for the damages occasioned by his wrong.

In *Mitchell* vs. *Langdon*, 10 Biss., 527, Judge Blodgett held the consignee liable to the owners of the ship for unreasonably delaying its unloading.

In *Wright* vs. *New Zealand Co.*, L. R., 4 Exch. Div., 165, 170, Thesiger, L., J., said: "The contract between the parties to this action was that which the law implies, namely, that the ship should be unloaded at her port of discharge within a reasonable time. A reasonable time means a reasonable time under ordinary circumstances, and in the absence of some stipulation altering the implied contract between the parties, the charterers would not be relieved from the consequences of fortuitous or unforseen impediments, affecting only the due performance by them of their part of the contract."

In that case there was no stipulation in the charter-party concerning the time of unloading.

In *Tillett & Co.* vs. *Cwm. Avon Works*, 2 Times Law Rep., 675, the ship-owners sued the consignee for damages for delay in unloading. In the bills of lading there was no stipulation as to the time for unloading, and the vessel could only be discharged at one of three berths, the property of the consignees, which, at the time of the arrival of the ship at the port, had all been occupied by other vessels with cargoes belonging to the defendants. It was held that, it having been an implied term in the contract that the defendants

should discharge the cargo within a reasonable time, the ship-owners, under the circumstances, could recover damages for the loss occasioned by the delay.

In *Carver on Carriage by Sea*, sec. 644, it is said: "The person responsible for demurrage due under a charter-party is ordinarily the charterer; and he continues liable, although other persons also may have become responsible, whether as shippers or as holders of the bill of lading. The charterer must still carry out the terms of the contract or see that they are carried out. Thus, he continues liable to give proper orders as to the port of discharge, to pay the freight, to see that the delivery of the cargo is taken in proper time or demurrage paid, and so forth."

In section 712, the author, in discussing the subject of damages for detention, says: "A fundamental principle is that compensation ought to be made to the party who has been wronged by the breach for the losses which he has sustained in consequence of it; that he ought to be placed in the same position, pecuniarily, as if the contract had been performed and not broken."

The application of these principles to the case at bar will give to the appellant the demurrage or damages which he had to pay the ship-owners, because such payment was caused by the wrongful omissions and acts of the Government. In that way only can he be placed in the same pecuniary position as if the contract had been performed.

X.

What is Nature and Scope of Action?

The question naturally arises as to whether this action is based on the maritime law of demurrage or is in the nature of an action on the case for the damages resulting from the detention of the ships. It makes no difference in legal effect whether the claim be treated as one of demurrage or for damages in the nature of demurrage; in either event it is to be governed by the law of the sea.

1. *Is it Action on the Case?*—If a vessel is improperly detained, the owner may have a special action for damages. Abbott Ship., 304; *Horn* vs. *Bensusan*, 9 Car. & P., 709; *Kell* vs. *Anderson*, 10 Mees. & W., 498; *Evans* vs. *Forster*, 1 Barn. & Ad., 118; *Clendaniel* vs. *Tuckerman*, 17 Barb., 184; 1 Pars. on Ship., 312, 313; Porter on Bills of Lad., 356; Scrutton on Charter-Parties, 299, 511.

Whether this be demurrage or not, the United States is liable in an action on the case for the damage resulting to the claimant by the improper detention of the ship, no matter whether there was a contract or not, or whether the bill of lading or charter contained a stipulation for demurrage, lay days, or detention, or not. 1 Pars. Maritime Law, 263, n.; 1 Pars. on Ship., 311; *Kell* vs. *Anderson*, 10 M. & W., 498; *Clendaniel* vs. *Tuckerman*, 17 Barb., 184; *Robertson* vs. *Bethune*, 3 Johns., 342; *Sprague* vs. *West*, Abbott Adm., 548; *Horn* vs. *Bensusan*, 9 Car. & P., 709; Abbott (Lord Tenterden)

on Law of Ships and Seamen, 241; Maclachlan on Shipping, 545, 546, and the cases we have cited in other parts of this brief.

2. *Is it for Demurrage?*—An improper detention of a vessel, however occurring, whether it be for time lost in making the necessary repairs occasioned by a collision or as the result of a breach of contract, express or implied, is considered as demurrage, and damages may be recovered in an action brought *eo nomine.* This is a general rule. *The Apollon*, Wheat., 378; *Williamson* vs. *Barrett*, 13 How., 101; *Sprague* vs. *West*, Abb. Adm., 548; *The M. S. Bacon* vs. *Erie & W. Transp. Co.*, 3 Fed. Rep., 344; *Randall* vs. *Lynch*, 2 Camp. (N. P.), 352, opinion by Lord Ellenborough; 3 Kent's Com., side p. 203; Maclachlan on Merchant Ship., 541, 545; 1 Pars. Mar. Law, 261; Abbott on Ships, 241; Desty on Ship., 246.

3. *Lay Days, What are they?*—We are now led to ask what is a *lay day?* Chancellor Kent says: "Being the days allowed to load and unload the cargo." 3 Kent's Com. side p. 203.

To the same effect are 1 Pars. Mar. Law, 261; Abbott on Ships, 241–243; 1 Pars. on Ship., 310; Maclachlan on Ship., 546; Desty on Ship., 246.

4. *When do Lay Days Begin?*—Lay days begin to run on the arrival of the vessel at the entrance of her dock, or other place of discharge, and not when she has merely reached the port of delivery. *Where notice of arrival was given to the consignee,*

the lay days begin to run after the time specified in the bill of lading. Desty on Ships, 246; 9 Am. and Eng. Ency., 2d ed., p. 234, 235, and numerous cases cited.

5. *What of Sundays and Legal Holidays?*—It is settled that the exception of Sundays and legal holidays from lay days does not apply to demurrage days, and the ship is entitled to demurrage for every day's detention after expiration of lay days. *After demurrage all days are counted.* Oliver on Ship., 4; Scrutton on Charter-Parties, 234; *Lindsey* vs. *Cusimano*, 12 Fed. Rep., 503, 504; *Hull* vs. *Cargo of Pig Iron*, 37 Fed. Rep., 124; *The Glenfilis*, 42 Fed. Rep., 232.

6. In concluding this branch of the argument we will say that the obligation of the Government was to receive the coal from the vessels "at the wharf" in the port of Honolulu; the cargoes were taken to and received in that port, and the Government did not keep the contract otherwise. If the officers representing the Government made an improvident or unwise contract to receive the coal "at the wharf," the fault is to be imputed to the Government and not to the appellant. The Government should have received the coal on ships, vessels, barges, lighters, or some other craft, while the ships were lying at anchor in the harbor, or it should have furnished berths or docks so that the ships could lie alongside them, being always afloat. The contract obligated the Government to do such or so many of these things as might be necessary to

enable the claimant to deliver the coal at the wharf within the time prescribed by the contracts. Failing so to do, the Government must pay the damages in the way of demurrage occasioned by such delays.

XI.

Refusal to Take Coal.

The fifth finding of fact. (p. 6) is as follows: "The coal actually delivered under the second contract was 4,634 tons, completed October 7, 1898. About a month subsequent to this claimant purchased 366 tons of coal of the barkentine *Omega*, then in the Honolulu harbor, and tendered the same to the defendant upon its contract of June 23, 1898, but the defendant refused to receive it, whereupon claimant sold the same in market, for the best price he could obtain, at $3.06¼ per ton less than $9, the contract price with the defendant, equivalent to $1,120.87."

Chief Justice Nott's dissenting opinion on this branch of the case is at page 16 of the Record.

In *Brawley's case*, 11 Ct. Cl., 522, was considered the true rule for the interpretation of the words "more or less" and their equivalents "about," "say," and "by estimation" in contracts made with the United States for the delivery and sale of merchandise or commodities. The cases are discussed by the court at some length, and on page 532 this rule is laid down: "When the contract is for the sale or delivery of a specifically named quantity of goods or articles, and the words 'more

or less' are added, with no reference to any other method of determining more exactly the quantity intended, or of removing the uncertainty created by those words, then the parties will be held to a quantity approximate to that specifically named, *allowing only such a slight variation therefrom as from the circumstances of the case or the nature of the articles to be delivered may seem to the court to be reasonable.*" (The italics are ours.)

In applying the facts to the rules of law laid down, the court held that there was other language in the contract which showed conclusively that the words "more or less" were not intended to be restricted to a small variation only of the quantity named, but were to have their full force and effect, and that it was contemplated that the quantity might be increased much beyond that specified in the contract; but the contract in that case contained language which is not to be found in the contract of the case at bar.

That case went to the Supreme Court of the United States, where the judgment was affirmed, and is reported in 96 U. S., 168. Mr. Justice Bradley wrote the opinion of the court, and on pages 171, 172, he laid down this rule: "But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material and governs the contract. The addition of the qualifying words, 'about,' 'more or less,' and the like in such cases is only for the purpose of providing against acci-

dental variations arising from slight, unimportant excesses or deficiencies in numbers, measures, or weight."

Immediately following this rule, he gives a lengthy description of what will be considered "independent circumstances," and, at the top of page 173, he applied the rule to the case before the court, saying that the contract was not for the delivery of any particular lot or any particular quantity, but was to deliver at the post 880 cords of wood, "more or less as shall be determined to be necessary by the post-commander for the regular supply, in accordance with Army Regulations, of the troops and employees of the garrison of said post for the fiscal year beginning July 1, 1871." And thereupon he said: "These are the determinative words of the contract, and the quantity designated, 880 cords, is to be regarded merely as an estimate of what the officer making the contract at the time supposed might be required. The substantial engagement was to furnish what should be determined to be necessary by the post-commander for the regular supply for the year, in accordance with Army Regulations. The post-commander, as soon as he learned of the contract, and within four days after it was signed, informed the claimant that but 40 cords of wood would be required thereon, and forbade his hauling any more to the Government yard."

Two cases more unlike than the *Brawley case* and the case at bar are seldom found. In the case at bar the first article of the contract obligates the claimant

to furnish and deliver "about five thousand tons" of coal; and the fifth article is as follows: "That for and in consideration of the faithful performance of the stipulations of this agreement the parties of the second part shall be paid at the office of the Quartermaster U. S. Army, who shall be designated by the Quartermaster General U. S. Army, at San Francisco, Cal., as follows: for five thousand (5,000) tons * * * steam coal as specified, the sum of nine dollars ($9) per ton of 2,240 pounds, in gold coin of the United States."

The sixth article is also of interest: "That in case of failure of the said parties of the second part to comply with the stipulations of this contract, according to the true intent and meaning thereof, then the party of the first part shall have the power to supply the deficiency by purchase in open market, and to charge up against the parties of the second part the extra cost over contract price of any coal so procured."

It will be observed that the word "about" is used only in article one of the contracts, and that in the fifth article the United States explicitly promises to pay for 5,000 tons of coal. It is on that stipulation that this suit is predicated. By it the Government contracted and agreed to receive 5,000 tons.

In *Brawley's case* the contractor agreed to furnish whatever wood the army officer might consider to be necessary for the troops and employees at the post. There is no such stipulation to be found in the contract sued on here.

We are strengthened in this view by the sixth article of the contracts, which gives to the United States the power to supply the deficiency by purchase in open market, charging up against the contractor the cost over the contract price of any coal so procured. Will counsel for the Government say, or can this court say, that the deliveries made to and received by the United States under this contract, lacking, as they did, 366 tons of coal, were so near compliance with the contract that the Government would not have had the right to buy 366 tons of coal in the open market and charge its loss against the contractor? Looking at the case from that standpoint, is it not perfectly clear that the contractor would have been held in default to the United States if he had failed to deliver that 366 tons of coal? Putting 20 tons of coal in a car, it would have taken a train of eighteen cars to haul this coal, which counsel for the Government seems to think an insignificant amount. At $9.00 per ton it would take $3,294 to buy this trifling quantity of coal. It may be not amiss to say that 366 tons of anthracite coal, delivered in this city within one week in the winter of 1892–3 would have dispelled the gloom from 1,000 homes. This amount of coal cannot be considered a bagatelle or classed among the "trifles light as air."

This coal, 366 tons, might be of vast importance to a warship. We get the following facts from a table which we were allowed to examine in the Bureau of Steam Engineering in the Navy Department. That table shows nineteen warships of less

than 366 tons, and thirty of more than that bunker capacity. Of the smaller ships, the cruiser *Detroit* has a bunker capacity of 335 tons, and can make 10 knots an hour for a day by using 27 tons, or can run at full speed for one day by using 65 tons of coal. Of the larger ships, the *Indiana* has a bunker capacity of 1,375 tons and can make 10 knots an hour for a day on 76 tons, and runs full speed one day on 160 tons. The *Oregon* has a bunker capacity of 1,556 tons, makes 10 knots an hour for one day on 65 tons and can run at full speed one day by using 140 tons of coal.

Thus it appears that the 366 tons of coal tendered by the claimant and refused by the Government would have filled all the bunkers of the *Detroit*, and would have run that ship at full speed more than five days. It would have run the *Indiana* at full speed for more than two days, and the *Oregon* at full speed for nearly two and one-half days. When the *Oregon* left Puget Sound on her historic voyage round Cape Horn, she only held four times as much coal as the claimant tendered to the Government. And yet we are told that 366 tons is such an insignificant quantity of coal that the defendant is excused in law for refusing to receive it on the appellant's contract.

The next case cited by counsel for the Government is *Norrington* vs. *Wright*, 115 U. S., 188, Mr. Justice Gray writing the opinion. The court approved the rule which we have already quoted from in *Brawley* vs. *The United States*, 96 U. S., 168, 171, 172. In *Norrington* vs. *Wright*, Etting entered

into a contract with Wright by which he sold for the account of Norrington 5,000 tons of iron rails for shipment "at the rate of about one thousand tons per month." The court held that the sellers were bound to ship one thousand tons in each month from February to June, inclusive, except that slight and unimportant deficiencies may be made up in July; and if only 400 tons are shipped in February, and 885 tons in March, and is informed that no more had been shipped in February, but gets that information after the arrival of the March shipment and before accepting or paying for either of them, he may rescind the contract by reason of the failure to ship about one thousand tons in each of the months of February and March. At the bottom of page 204 Mr. Justice Gray holds that the case comes within the general rule heretofore quoted from the *Brawley case* and said: "The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity;" * * * "the plaintiff instead of shipping about one thousand tons in February and about one thousand tons in March, as stipulated in the contract, shipped only four hundred tons in February and eight hundred and eighty-five tons in March. His failure to fill the contract on his part in respect to these first two installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of decision."

We think that little more need be said on this branch of the case, for it seems to us that we have shown that all of these cases are clearly and unequivocally adverse to the position taken by the majority of the court below.

We submit that the judgment of the court below should be reversed in all things, and that this court should direct a judgment for the appellant for the amount of each item claimed.

W. W. DUDLEY,
L. T. MICHENER,
Attorneys for Appellant.

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Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 71.

JOHN J. MOORE, Trading under the Firm Name of J. J. Moore & Co., Appellant,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

REPLY BRIEF.

W. W. DUDLEY,
L. T. MICHENER,
Attorneys for Appellant.

BYRNAN V. ELLIOTT PRINTING CO.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1904.

JOHN J. MOORE,
trading under the firm name of
J. J. MOORE & Co.,
Appellant,
vs.
THE UNITED STATES.

No. 71.

APPEAL FROM THE COURT OF CLAIMS.

Reply Brief.

I.

The brief for the United States begins with a "Statement" which is really a mingling of fact, law, and argument instead of a mere statement of facts as found by the Court below. As all of the arguments suggested in that "Statement" are developed in the other branch of that brief, we will content ourselves with discussing them in that connection.

II.

Under the head of "Argument" counsel for the government has advanced certain propositions for discussion.

1. Some question is made of the application here of the rules of law relating to custom. We have shown on pages 7 to 16 of our original brief that the custom prevailing at the port of San Francisco must be considered as if it had been read or written into the body of the contract though it be unknown to one of the contracting parties. Such custom is as binding on all parties to the contract as is the law of the land. The writing, the law and the established custom make up the contract.

It is no answer to say that these rules operate to "enlarge the contract." Established custom no more enlarges the contract than does the law of the land.

2. On page 8 of the brief for the government it is argued that, if custom is to be called into service for the purpose of interpreting or explaining the contracts sued on, the custom of the port of Honolulu, so far as it relates to discharge of cargoes, must regulate and determine the contracts.

Custom is not called into service to *interpret* or *explain* the contracts but to show what is embodied in them in legal contemplation. The custom of the port of San Francisco, as set out in Finding III, Rec. page 11, required consignee to direct what berths or places should be used for the discharge of cargoes, the discharge to commence when ships were ready and notice thereof given by the captains in writing, etc. That custom must be treated as if written into the contracts with the United States. It dealt with the conduct of the ships and the consignee at Honolulu, the port of discharge, and covered the situation completely. The custom of the port of Honolulu concerning the discharge of the cargoes had nothing at all to do with these contracts or with the manner of delivering the cargoes under the contracts. Had

there been nothing at all in the contracts, or had there been no established custom on these subjects in the port of San Francisco embodied in the contracts by operation of law, the custom of the port of Honolulu might well have been an essential factor in this business.

But as the custom of the port of San Francisco must be treated as written into the body of the contracts, there is no occasion here to consider what the law would be if the case were covered by a custom of the port of Honolulu. We must deal with the case as it is.

3. On pages 9 to 13, counsel for the government has argued that the government has a complete defence because the harbor master at Honolulu had charge of the harbor and assigned ships to berths at the wharves in the order of their respective arrivals.

On pages 16 to 42 of our original brief, we have shown that the appellant was not in any sense responsible for the conditions existing in Honolulu. The government should have arranged to take the coal elsewhere than at the wharves if the congestion was so great as to cause delay. Counsel for the government seems to overlook the fact that the government had contracted to take these cargoes at certain dates or periods of time. Indeed, he seems to ignore essential features of the contracts, as well as Finding III, relating to the custom of the port of San Francisco, which is to be treated as written into the contract and as regulating the business in the port of Honolulu and fixing the rights of all parties. No regulations or laws in force at Honolulu could destroy the binding force of the contracts. Finding III can no more be obliterated from the case than can the contracts copied in Finding II. Whatever there may have been in the

way of regulation or custom in the port of Honolulu, not in harmony with the contracts and the custom set forth in Findings II and III, must be held as nought and in no sense binding upon either of the parties to this case.

4. Counsel for government, on pages 14 to 19, discusses the question as to the time when the "lay days" began to run.

We have considered that question on pages 50 to 52 of our original brief. According to facts set forth in Findings III and IV, there cannot be any doubt about the rules of law applicable to them. The custom at the port of San Francisco is clear and definite. The dates of the arrival of the ships at Honolulu are fixed, and the Court finds "that in the case of each ship the defendant had notice in writing of their respective arrivals within twenty-four hours thereafter." In view of all this, we do not deem it necessary to consider the authorities cited by counsel further than to say that they are all predicated upon other contracts and conditions and are not applicable to this case.

III.

On page 21 and to the end of his brief, counsel for the United States discusses the liability of the government for refusing to receive the 366 tons of coal. On page 23 it is said: "The appellant did not charter another vessel to carry the 366 tons, but purchased the same from a vessel lying in harbor at the dort of Honolulu. Was he aware at the time he made the purchase that the United States considered the contract closed? Had the United States at the time he made such purchase actually refused the coal? As to these pertinent points the findings are silent."

We state professionally that not one word of evidence on those subjects appeared in the record in the Court below, nor did the government make any attempt, in cross-examining the claimant and his witnesses, to elicit such evidence. We think it safe to assume that the claimant would not have been foolish enough to go to all that trouble and hazard if he had been aware that the government considered the contract completed or closed. We have no doubt at all that, if such had have been the fact, the government would have proven it by some of its witnesses or by cross-examining the claimant's witnesses, or by producing official documents. The total absence of such evidence and findings destroys the argument made by counsel for appellee.

We think it perfectly clear, if the government had actually refused before that time to receive that coal from the claimant, he would not have bought and tendered it, nor would the government have allowed the fact to go unproven. We may depend upon it that had these facts been proven, the Court below would have found them, or the counsel for the government would have taken the steps necessary to have the finding made perfect.

It is sufficient to say now that the claimant was obliged by his contracts to furnish certain quantities of coal, and that he tendered the remainder of that quantity, or 366 tons, "but the defendant refused to receive it," to use the language of Finding V.

The subject is discussed fully on pages 53 to 60 of our original brief.

V.

The claimant did what his contract required him to do; no more, no less. For having done that much,

he is criticised by counsel for having tendered the full amount of coal agreed upon and making a profit thereon. Patriotism and loss of profits are not synonymous terms. Performance of contracts may be said generally to be in harmony with love of country.

W. W. DUDLEY,
L. T. MICHENER,
Attorneys for Appellant.

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Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

JOHN J. MOORE, TRADING UNDER the firm name of J. J. Moore & Co., appellant,
v.
THE UNITED STATES.
} No. 71.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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In the Supreme Court of the United States.

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JOHN J. MOORE, TRADING UNDER the firm name of J. J. Moore & Co., appellant,
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THE UNITED STATES.
No. 71.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Appellant was at the time of the matters complained of in the petition a general commission merchant and shipper, engaged in business at the port of San Francisco, Cal.

In June, 1898, he sold to the United States, through its proper representative at said port, under two separate contracts, about 8,900 tons of coal, to be delivered "on the wharf" and "on the wharf as customary" at Honolulu, Hawaiian Islands, for which the United States agreed to pay a stipulated price.

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When the vessels chartered by appellant carrying the coal arrived at the port of Honolulu they experienced some delay in discharging their respective cargoes, due to the fact that they were unable to get a berth at the wharf at that port promptly on their arrival.

The first and most important issue in this case arises from the cause and effect of the delay of the vessels in procuring a berth at the wharf at which to discharge cargo.

The real cause of the delay was the operation of the regulations governing the use of the wharves at the port of Honolulu. At the time of the arrival of the vessels carrying the coal the Hawaiian Islands had not passed under the control of the United States. The port of Honolulu was consequently a foreign port, its harbor being under the supervision and control of an officer of the Hawaiian Government called a "harbor master." The vessels arriving in the harbor were anchored by the harbor master upon their arrival, and subsequently assigned to berths at the wharves of the harbor by him *in the order of their arrival.* The United States had no wharf at the port, nor other means of receiving cargoes, and had no authority or control whatever over the harbor master. At the time of the arrival of the vessels carrying the coal in question the harbor was crowded, a number of vessels being moored at the reef. (Finding 6, R., p. 12.)

The vessels carrying the coal in question were, as a matter of fact, assigned to berths at the wharf by the

harbor master in the order of their arrival at the port. Some of the vessels carrying the coal were compelled to lie at anchor in the stream for a number of days previous to being assigned to berths. (Finding 4, R., pp. 11 and 12.)

Under these circumstances it is perfectly clear that the thing which caused said vessels to be detained at the port beyond their respective "lay days" was, as we have stated, the result of the operation and execution of a law or regulation of the Government in authority at the port of delivery.

Appellant actually paid the owners of certain vessels carrying the coal demurrage for the days said ships were detained at the port after the expiration of the "lay days" stipulated for in the charter parties between the shipowners and the appellant. (Finding 4, R., p. 12.)

It is the contention of the appellant that under the law and the contract or contracts between him and the United States for the purchase and sale of said coal the United States is answerable for the sum thus expended as damages in the nature of demurrage resulting from said delay. In other words, it is the contention of the appellant that the United States must respond to the appellant for damages to the amount paid the owners of said vessels as demurrage by appellant under his contract with their owners, although the United States was in no way privy to said contracts, and regardless of the fact that it was powerless to avoid the delay ensuing from the operation of the law and custom of the port of Honolulu relative to docking vessels.

It is our contention that inasmuch as the United States was in no way responsible for the delay of the vessels in reaching a berth at the wharf and was in no way able to avoid this delay, the loss does not and can not fall upon the United States.

There was no delay in receiving the coal after the arrival of the vessels carrying the same at the berth assigned to them by the harbor master except in one instance. The bark *Harvester* exceeded its "lay days" two days while discharging at the wharf, but it does not appear that the United States was at fault in causing this loss of time in discharging said cargo. (Finding 4, R., p. 12.)

The second issue in this case arises from the facts stated in the fifth finding of fact (R., p. 12).

The contract provided for the delivery of "about 5,000 tons" (R., p. 8).

Appellant shipped on board the bark *Harvester* and the ship *General Gordon* 4,634 tons, delivery of which, under the contract, was completed from the *General Gordon* October 4, and from the *Harvester* October 7, 1898. (Finding 4, R., p. 12.)

About one month subsequent to the completion of the delivery as aforesaid the appellant purchased from a vessel then in the harbor of Honolulu 366 tons of coal, being the amount necessary to make complete delivery of the 5,000 tons mentioned in the second contract, and tendered the same to the United States. The United States, by its properly authorized agent, refused to receive said 366 tons of coal, whereupon

the appellant sold the same in the open market for the best price he could obtain, which was $1,120.87 less than the contract price. (Finding 5 R., p. 12.)

It is the contention of the appellant that he was bound to deliver the full 5,000 tons and that the United States was bound to receive and pay for the same. It is our contention that the United States, under the facts and circumstances above related, was warranted in assuming that appellant had completed his contract when he delivered the cargoes from the two vessels above named, the amount so delivered being "about 5,000 tons," and that in any event it was not obliged under the contract to receive and pay for the 366 tons offered as aforesaid.

Some minor facts with relation to this transaction are found by the court, but they will be noticed in the course of the argument.

ARGUMENT.

These facts present two propositions for argument: (1) Was the United States obliged, under the contracts in question, or by law, to furnish a wharf at which the vessels carrying the coal could discharge their cargo, within twenty-four hours after receipt of notice of the arrival of said vessels at the port of Honolulu; in other words, did "lay days" begin to run within twenty-four hours after the receipt of said notice? And (2) was the delivery of 4,634 tons of coal at the time and place it was delivered a completion of the second contract with reference to the amount of coal stipulated to be delivered thereunder?

1. The first contention of appellant is that the contracts for the purchase and sale of the coal in question should have read into them the custom and usage at the port of San Francisco with reference to the beginning of "lay days" and the payment of demurrage for any time the vessel might be held in excess thereof.

The learned counsel for appellant devotes considerable space in his brief to an exposition of the well-known doctrine of law that custom and usage known to the parties may be incorporated in their contracts where nothing is said therein to the contrary. As an abstract proposition there is no room for dispute about this, but we submit that the principle is only to be applied where the custom and usage relate directly to the subject-matter of the contract.

It will be observed that the contracts between the appellant and the United States are silent as to the carriage of the coal in question. Under those contracts the appellant bound himself to deliver the coal "on the wharf" and "on the wharf as customary" at Honolulu. The United States bound itself to receive the coal "on the wharf" and "on the wharf as customary" at Honolulu at the rate of not less than 100 tons per day, that is per working-day, and to pay therefor a stipulated price. What could be plainer or more unambiguous than these provisions of the contracts? Is it reasonable to suppose that the agent of the United States in the premises understood when he made these contracts that he was obligating the United States to pay a fixed and definite amount of demurrage

in case the vessel was compelled to lie in the harbor of Honolulu awaiting its turn at the wharf? The Court of Claims finds as a fact with reference to this matter:

> It does not appear that the officers and agents of the defendant who were authorized to make and (who) did make the contracts for the defendants had any knowledge or notice of such custom, nor that the contracts, or either of them, were made in view of such custom. (Finding 3, R., p. 11.)

The agent of the United States had no authority to make any contract for the carriage of the coal. His authority simply extended to the purchase of the coal. Even if the custom was so well established that it could be said the United States agent knew it, because he ought to know it, it can not be made a part of the contract in question. To hold that it should, would be to enlarge the contract, not to explain it.

It is not denied that, as a matter of law, the United States would have been liable for demurrage under said contracts if it had been derelict or in fault in causing the delay which occurred at the port of discharge. That is to say, if the vessel had reached the wharf and the United States failed, for *any* reason, to remove the coal therefrom fast enough to permit the vessel to discharge the 100 tons thereon for each working day thereafter, or if the United States had in any way prevented the vessel from coming to the wharf or caused it to lose its "turn," it would have been answerable for damages in the nature of demurrage in such amount as

might, under all the circumstances, be deemed just and proper. But it seems clear to us that if there is any liability on the part of the United States it is not because of any express stipulation contained in its contract for the purchase of the coal, or because of any stipulation to be incorporated into the contracts by reason of the existence of the custom among shipowners and shippers at the port of San Francisco.

If custom and usage are to be called into service for the purpose of interpreting or explaining the contracts in question, the custom of the port of discharge, so far as it relates to the manner and mode of discharge, must regulate and determine the contracts. Carver, in his work on Carriage by Sea (par. 461), says:

> The manner of discharging also is, in the absence of special terms, to be determined by reference to the regulations and practices of the port of discharge. These will show whether the goods should be discharged in the open water or at wharf or any dock, and whether on the wharf or quay or into a hulk or lighters alongside the ship. If one or more of these methods is commonly adopted and is suitable for the particular ship and cargo, it would seem that the shipowner satisfies his contract by delivering according to any one of them he may choose, but if one mode of discharge involves charges upon the consignee which another and suitable and convenient mode avoids, the shipowner can not, contrary to the consignee's demand, insist upon adopting the former.

The liability of the United States in this instance is that of consignee.

> In such case, the only liability, if any, is for damages in the nature of demurrage for failure to use reasonable diligence in discharging in accordance with the *custom of the port.*
>
> (Am. and Eng. Encl. of L., vol. 9, p. 229, new ed.). (*Houge* v. *Woodruff*, 19 Fed. Rep., 136.)
>
> The general rule is that the consignee is not liable for delay due to causes *beyond his control.* (Am. and Eng. Encl. of L., vol. 9, p. 257, new ed.)
>
> He is not liable if the delay is due to interference of the Government or public authorities. * * * Where the consignee is not bound by the contract to furnish a berth and where the vessel is required to take its turn in unloading, *he is not liable for delay caused by an extraordinary accumulation of vessels to be unloaded.* (Id., p. 258.)

It has been held in any number of cases that where the vessel arriving is obliged, either by the custom of the port, or the contract, or bill of lading, to await its turn in discharging, the consignee is not liable for damages in the nature of demurrage resulting from delay caused by the harbor being overcrowded with vessels. In the case of the *J. E. Owen and other vessels* v. *49,774 Bushels of Rye* (54 Fed. Rep., p. 185) this doctrine was clearly and unequivocally stated by the learned judge. In that case the bill of lading had no provision in it for "lay days" or demurrage. The vessels were loaded with grain from Chicago to Buffalo. When they arrived at Buffalo there were twenty-eight boats ahead of them—an unprecedented number. There was a delay of several days to the boats in

question in getting into position at the usual place of discharge for such cargoes, due entirely to the fact that said vessels had to await their turn to discharge. The court, after reviewing the facts in the case, held that the consignees were not liable for the damages resulting to the shipowners from a delay of ten days in unloading. The court says (p. 188):

> After an examination which was intended to be thorough, I fail to find a single authority allowing damages in circumstances like those developed in the case at bar. Vessel owners can stipulate for "lay days" if they so desire, but if they prefer not to do so they must take the risk of delays occasioned by such phenomenal circumstances as these which occurred at Buffalo in November and December, 1891.

In support of its decision the court cites (p. 187):

Riley v. *Cargo of Iron Pipes*, 40 Fed. Rep., 605.
Cross v. *Beard*, 26 N. Y., 85.
Wordin v. *Bemis*, 32 Conn., 268.
The Glover, 1st Brown, Adml., 166.
Clendaniel v. *Tuckerman*, 17th Barb., 184.
Towle v. *Kettell*, 5 Cush., 18.
Weaver v. *Walton*, 5th Chi. Leg. N., 125.
Abbs. Shipp., 311–313.
Fulton v. *Blake*, 5th Biss., 371.
Rodgers v. *Forresters*, 2d Camp., 483.
Burmaster v. *Hodgson*, Ed., 488.
The M. S. Bacon, 3rd Fed. Rep., 344.
Coombs v. *Nolan*, 7th Ben., 301.
Velatty v. *Curtis*, 41 Fed. Rep., 479.
The Elida, 31 Fed. Rep., 420.
The Mary Riley v. *3,000 Railroad Ties*, 38 Fed. Rep., 254.

Every one of these cases goes to sustain the proposition we have presented.

See also *Empire Transportation Co.* v. *Phila. and R. Coal and Iron Co.* (77 F. R., 919).

> In the absence of any custom or express contract to the contrary, it is the ship's business to find a berth in the port of discharge. (*Smith* v. *Granite Paving Co.*, 56 Fed. Rep., 525–527.)

In the case at bar, there was not only no express contract binding the consignee to find a berth, but, on the other hand, there was a positive and distinct custom which rendered it impossible to do so.

The general rule is, as has been before stated, that the consignee is not liable for delay due to causes beyond his control. The delay of the vessels in question in getting to a berth at the wharf was certainly caused by matters beyond the control of the agents of the United States at said port. It was due entirely to the interference of the government, or public authorities of the government, of Hawaii. Reference to the contract involved in this case will show that no set terms were agreed upon as to the manner of discharging further than that the cargoes were to be discharged "on the wharf." The facts as found by the Court of Claims show that at the port of Honolulu, which was under the control of the Hawaiian government at the time, there was a regulation enforced by the proper officer of said government which compelled the ships carrying the coal in question to await their turn in coming to the wharf or usual place for discharging coal. It

was not customary to receive cargoes of coal in lighters at said port. It was customary to receive it only at three of the eleven wharves or docks at said port. As a matter of fact, the vessels carrying the coal in question came to the wharves for the purpose of discharging under and in compliance with this rule and regulation. It was not possible for the agents or officers of the United States to have furnished lighters into which the cargo could have been discharged, nor was it their duty, under the contract or the law, to do so. Having no control over the wharves or the officers of the Hawaiian Government in charge of the harbor, said officers and agents of the United States were powerless to furnish a wharf or to expedite in any way the assignment of said vessels to a berth at the wharf. It may be argued in favor of the appellant that neither he nor the ships' owners or masters could have avoided the delay which occurred. That is true; but both the charterer (the appellant) and the owners of the vessels were necessarily familiar with the custom prevailing at the port of Honolulu with reference to discharging vessels. But even if they were not familiar with said custom and usage, it does not alter the fact that the liability of the United States is to be determined by the rules, customs, and practices of the port of discharge.

Where the consignee is not bound by the contract to furnish a berth (and the consignee in this case certainly was not), and where the vessel is required to take its turn in unloading (the vessels in this case certainly were), he is not liable for delay caused by an extraordinary accumulation of vessels to be unloaded. Such

is the principle to be gleaned from the authorities heretofore cited. Reasonableness is all that is required of the consignee with reference to the receipt and disposal of a cargo in all shipping contracts, and as we have before stated, where the charter party or the bill of lading is silent as to the matters in dispute here, reasonable conduct only is required.

> *Whiteside* v. *Halstead*, 90 Ill., 95;
> *Etten* v. *Newton*, 134 N. Y., 143;
> *Dayton* v. *Park*, 142 N. Y., 391.
> American and English Enc. of Law, vol. 9, p. 255, new ed., and cases cited under note 3.
> Carver's Carriage by Sea, par. 636; 7 Comp. Dec., 573.

It will no doubt be answered that this rule applies as well to the appellant as to the appellee, and that inasmuch as the vessels were not at fault in the delay in reaching a berth at the wharf, the loss should not fall on them. But the answer to that proposition has been already given in the statement of the fact that vessel owners and charterers all over the world, where the contract is not specific, are held to abide by the rules and customs and usages of the port of discharge with reference to matters of this kind, and that therefore the loss must rest where it falls.

Parsons, discussing contracts of affreightment, says (vol. 2, p. 423), with reference to the time when freight becomes due:

> If the ship can not reach the port by reason of blockade or any similar cause, this, though not the fault of the ship, is its misfortune.

The same principle applies here. If the ship can not claim freight until it has arrived at the place of discharge, it certainly follows that "lay days" do not begin until it has reached the designated place of discharge, which in this case was the "wharf."

Counsel for appellant has, at considerable length and with great erudition, shown that damages in the nature of demurrage are recoverable, in the absence of an express contract therefor, under certain circumstances. We have already admitted that the United States might legally be liable for such damages if the same were the result of its neglect, default, or miscarriage, but we insist that the facts do not make a case of default, neglect, or misconduct on the part of the United States, its officers or agents.

The only possible question which it seems to us yet remains for discussion in relation to this proposition is as to the time when the "lay days" prescribed for such vessels began to run. It is conceded that the contracts between the appellant and the United States fix the number of "lay days" for the discharge of each vessel in that article or provision of the contract wherein it is stipulated that said vessels shall be discharged at the rate of not less than 100 tons per day. It is insisted by counsel for appellant in his brief, and many authorities are cited by him in support of his proposition, that these contracts having fixed the number of days within which the vessels should be discharged, the United States was responsible and liable for its failure to receive the cargo within the specified

number of days, beginning twenty-four hours after notice of the arrival of the vessel in port; that is to say, in the case of the vessel *Euterpe*, for instance, which if it had been discharged at the rate of 100 tons per day, beginning twenty-four hours after its arrival in port, would have been discharged within sixteen days, but the discharge of which was not completed until thirty days after the arrival of the vessel at the port, he insists the United States was liable for the fourteen days during which the vessel was compelled to lie in the harbor awaiting an opportunity to come to the wharf to discharge its cargo.

No doubt if the vessels had been prevented, *after they arrived at the wharf*, from discharging one hundred tons of coal thereon per day by reason of dereliction or fault on the part of the United States, it would have been liable for damages resulting from such delay, and that is the gist of every decision cited by counsel for appellant in his brief.

The general rule is that "lay days" for unloading do not commence when the vessel arrives in the port of discharge. (*Brown* v. *Johnson*, 10 M. & W., 331.)

> They are to be computed from the time she arrives at the place of discharge *usual for such vessels in the particular port*, ordinarily at the wharf or dock, and is ready to discharge there in accordance with the contract *and the custom of the port.* (Italics are ours.) Amer. and Eng. Enc. of Law, vol. 9, p. 231, new ed.
>
> The vessel does not fulfill its contract by stopping at the entrance of the port of discharge, but must proceed to the very berth or

dock designated, if one is named in the contract, but if not, *to the place customarily used for discharge by vessels loaded with similar cargoes.*

Bereton v. *Chapman*, 5 Moo. P, 526.

Bremner v. *Bunell*, 4 Sess. Cass., 934.

In the case at bar, the facts show that the usual place of discharge for coal was one of three wharves to which the vessels in question were assigned and came in the order of their arrival at the port, in accordance with the custom of the port.

Carver, in his work on Carriage by Sea, paragraph 622, says:

> It is often a matter of great difficulty to determine when the lay days are considered to have commenced or, if no lay days are fixed, to determine when the charterer's responsibility for the detention of the ship attaches. Speaking generally, the ship must have arrived at the place agreed upon for the loading or discharging, and must be ready to take in the cargo or deliver it, as the case may be.
>
> But the place named is usually one of wide extent, comprising areas where the work of loading or unloading would in a practical sense be impossible, and thus the question arises whether the ship must be lying in any particular part of the named place of loading or discharge; also the further question of who is to bear the burden of delay if the shipowner is prevented by causes for which he is not responsible from at once ` ` ging the ship to the spot where she ought t be.

Further along the author says, if the place of discharge named be a particular wharf:

> The ship must get alongside that wharf before the charterer can be required to load or take delivery, and he will not be responsible for a delay in getting alongside due to the set of the tide or to the occupation of the wharf by other ships. The wharf is the place at which only the charterer has undertaken to do his part. Therefore, generally the lay days do not begin until the ship is ready for him *there*.

See also authorities cited under Note F, id., page 710.

In the case at bar a particular wharf was not designated by name, but it was specifically and definitely stated in the contract between the appellant and the United States that the coal in question should be delivered at *a* wharf in the port of Honolulu and the facts found show that only one of three places at said port would conform to this requirement. To one of these places the ships in question must come before "lay days" would commence to run, and the consignee (the United States) was not liable for delays to the ships in coming to said place or places caused by the occupation of the same by other ships.

So it seems clear that the "lay days" provided for said vessels should not be held to begin to run against the United States until after the arrival of the vessels in question at the wharf. It appears from the facts that the ship *Euterpe* arrived at the wharf at 2.15 p. m.

on the 8th day of August, 1898, and commenced discharging coal the same day, and finished August 29, 1898, thus consuming eighteen working days. Said vessel had on board 1,543 tons of coal. Had she been discharged at the rate of not less than 100 tons per day (the amount stipulated in the contract), the time consumed would have been sixteen days. It therefore appears that after said vessel arrived at the wharf she was detained two days beyond her regular "lay days," but it does not appear that the United States was the cause of said detention. On the contrary, it does appear that the United States was willing and ready and able at all times to have taken the coal at the contract rate of 100 tons per day. (Finding IV, Rec., p. 11.) The burden of proving that the detention was due to some fault or negligence on the part of the United States was upon the appellant. (54 Fed. Rep., 185–186.) There was no delay in discharging the other vessel, the *General Gordon*, after it reached the wharf; that is, she was discharged within the stipulated number of days after her arrival at the wharf

Counsel for appellant refers to the fact that there is a paucity of cases bearing upon the question involved in this case. He says this is probably attributable to the fact that parties situated as the United States is in this case have not heretofore disputed their liability to pay demurrage under such circumstances, but have without question settled all claims of that character, thereby precluding the possibility of such cases getting into court. We think it will appear from the authori-

ties cited by us that this is a mistake of fact. But if it were true, it would be just as reasonable and sound for us to say that the reason therefor was because persons situated as the shipowners in this case, or as the shipper and charterer (the appellant), have not had the temerity, to say the least, to institute legal proceedings to collect such damages as are here claimed.

Counsel also lays great stress on the rule of construction that wherever doubt arises as to the interpretation to be put upon contracts liberality of construction should be indulged in in favor of the person who merely signs the contract and against the one who draws the same. The existence of such a rule in the construction of contracts is not disputed. Its efficacy, however, is a matter of varying views by the authorities. In applying it it should always be remembered that other rules are given for the construction of contracts, such as the application to doubtful words of their usual and ordinary meaning, etc., which take precedence over the rule *contra pro forentum*.

> The reason for the rule is that men generally are supposed to take care of themselves in making contracts, and that he who gives and chooses the words by which he gives ought to be held to a strict interpretation of those words rather than he who only accepts. But the reason is not a very strong one, nor is the rule of special value. It is, indeed, often spoken of as one not to be favored or valued unless other principles of interpretation fail to decide a question. (Parsons on Contracts, vol. 2, p. 663.)

See *Adams* v. *Warner* (23 Vt., 411).

But however efficacious or necessary the rule may be in ordinary cases, it is of no use in the case at bar. There is nothing ambiguous or uncertain about the contract with reference to the sale or delivery of the coal. It was to be delivered "on the wharf" and "on the wharf as customary" at Honolulu. It is not necessary to invoke any of the rules of construction or interpretation to determine what those words mean. There is no room for construction, and consequently nothing for construction to do.

If this rule has any application at all in this case, it is as to the second proposition, and if applied there it would be a stricture upon the argument of the appellant in this case, for the reason that the word "about," which is the turning point of the questions involved in the second proposition, was introduced into the language of this contract by the appellant himself, as is well stated by the Court of Claims in its opinion.

Before taking up this second proposition for discussion, we beg to call the court's attention to the fact that the Court of Claims was unanimous in its opinion regarding the claim of appellant for demurrage in this case. We do this for the reason that counsel for appellant has referred in at least two places in his brief (pages 7 and 11) to the "majority" opinion of the court in such a way as to leave the impression that the dissenting opinion referred to the branch of the case we have just been discussing. A very cursory examination of the transcript will show that the Court of Claims was not divided on the question of the claim for demurrage.

(2) It scarcely seems necessary to discuss the second proposition. The meaning of the word "about" is so well known that no definition need be given.

Benj on Sales, Par. 691.
96 U. S., 168–171–172.
115 U. S., 189–204.
57 N. Y. super. ct., 57.
54 Md. R., 187.
7 Ind app., 462–467.
5 Gray (Mass.), 589.
6 El. & Bl., 675–678.
2 Camp., 56.
L. R., 5; P. C., 203–217.
1 P. C. Div., 155–158.

It is only a question of whether or not, under the circumstances surrounding this particular case, the delivery of 4,634 tons of coal was the delivery of "about 5,000 tons" of coal. It seems clear that it was.

It will be observed that the appellant, by his letter of June 22, 1898 (Rec., p. 10), refers to the fact that the first vessel carrying coal contracted for under the second contract would have a capacity of about 2,200 tons. From this it is reasonably to be inferred that it was the intention that the next vessel would contain the balance necessary to fulfill said contract. To have done so it would have been necessary for said vessel to have carried 2,800 tons. The first vessel, which had a guaranteed capacity of 2,200 tons, actually had on board 2,179 tons (Rec., p. 12). The second vessel, the *General Gordon*, in order to have made the exact 5,000 tons, should have had on board 2,821 tons. It actually

had on board and delivered 2,455 tons. Delivery from both vessels was completed about the same time, the last date being October 7, 1898. So far as the findings show, nothing was said at that time by the agent of the United States to the shipowners or the shippers about the delivery of a further consignment of 366 tons, nor was any communication had with the appellant looking toward further delivery under said contract. No demand was made at any time for the 366 tons. If any had been, we think, with all due respect to the dissenting opinion of the Court of Claims, that the United States would not have been justified in going into the market in case the demand was refused, and buying the coal necessary to make the delivery equal to 5,000 tons. The vendor could very well and justly have answered the demand by saying that the contract in question was for "about 5,000 tons;" that it was well known to the contracting parties that the coal in question would have to be transported long distances by ship; that the vendee or consignee certainly could not expect the exact, the identical, amount named in the contract to be loaded on two ships or three ships carrying full cargoes; that the vendee or consignee certainly knew, or should have known, that there would in all probability be a variation between the guaranteed capacity of the vessel and the amount which could be actually loaded therein; that in using the word "about," the vendor had intended to provide for just such a contingency; that the amount actually delivered from the two vessels was so near the 5,000 tons mentioned as to be

"about 5,000 tons." In short, it seems clear that the appellant would have been absolved from further delivery under his contract after delivering the amount carried by the two vessels in question, even if a demand had been made upon him therefor, and, as the learned member of the Court of Claims dissenting from the opinion of the court well says, "It is a poor rule that won't work both ways."

The appellant did not charter another vessel to carry the 366 tons, but purchased the same from a vessel lying in harbor at the port of Honolulu. Was he aware at the time he made the purchase that the United States considered the contract closed? Had the United States at the time he made such purchase actually refused the coal? As to these pertinent points the findings are silent. Pertinent we say, because if the 366 tons of coal were purchased in good faith, under the belief that the United States was expecting and looking for further delivery under said contract, the appellant would, before purchasing the same in the harbor of Honolulu, have had some communication with the agent of the United States who was located at that harbor with reference to the delivery of the same. So far as the findings show, the first intimation the United States had that the vendor regarded himself as bound to make a further delivery under said contract was when the coal was tendered, presumably at the wharf. It should be borne in mind that this was one month subsequent to the last delivery. It seems to us the natural and proper thing for the vendor to

have done under the circumstances would have been to go to the agent of the United States and say to him: "Our contract for the delivery of 'about 5,000 tons of coal' is not yet completed. We are still bound to furnish you 366 tons of coal. We can purchase the same from a vessel now in harbor. Shall we deliver it?" Had any such conversation occurred, unquestionably the vendor would have been advised that he need not purchase the coal; that the United States did not need it, and regarded the contract as closed.

From the fact that coal sold in the harbor immediately after this purchase for about $3 per ton less than the contract price, it is inferable, it seems to us, that the price paid for it by appellant was not greater than that for which he sold it. It is not intended by this remark to suggest that the measure of damages should not be the difference between the contract price and the price the coal actually sold for in market, if there is any legal liability for damages at all, but the purpose is to call attention to what we believe to be a motive for the purchase and tender of the 366 tons in question. It is a well-known fact that coal was hurried to Honolulu during the summer of 1898 by the Army and Navy from all possible sources. War was in progress, and it was the desire to provide a large stock of this commodity for possible emergencies. The price of coal consequently went up. By the 1st of November the war was over. The necessity for the accumulation of a large quantity of coal by the Army and Navy, apparent when this coal was purchased, had disappeared.

The result was that not only was there a large stock on hand, but the price of coal dropped very materially. These are historical facts. In the light thereof, and in view of the actions of the appellant, we believe we are justified in drawing the conclusion that the purchase and tender of the 366 tons of coal was an attempt to crowd or force upon the United States, under the pretext of a contract obligation, this amount of coal, on which a clean profit of more than $3 per ton could be made without any risk. If coal sold in the open market for $6 per ton, or thereabout, immediately after the tender was made, it is reasonable to say that inasmuch as the identical coal had just been purchased in the harbor where it was tendered, that not to exceed $6 per ton was paid for it, that being shown to be the price in the open market.

The desire to reap that profit, it seems to us, more reasonably accounts for the purchase and tender than any such high and lofty purpose as is attributed by counsel for the appellant to the act—providing the Government with coal to supply its war ships. Appellant knew, as everybody else at the port of Honolulu knew, that the Government was overstocked with coal at that time.

Counsel for appellant has made some comparisons with a view to showing that 366 tons of coal is sometimes an important factor. Among other things, he suggests that the presence of that quantity of coal in Washington during the recent anthracite-coal strike would have gone far to "dispel the gloom from a

thousand homes." As compared with the stock carried in the average Washington coal bin, 366 tons is a large amount. It may not be insignificant when compared with the capacity of the bunkers of the modern war ship, but when compared with the quantity with which we are here dealing it is small, if not insignificant. It is, in fact, less than 8 per cent under the tentative amount named in the contract. Had it been on the other side of the ledger, so to speak, could the United States have been heard to complain that there was an overdelivery? Had the *General Gordon* been of sufficient capacity and had it actually had a cargo which would have made the aggregate delivery 366 tons in excess of the tentative amount named in the contract, would not the United States have been compelled to accept the entire cargo?

Counsel says that this suit, so far as it relates to this particular item, is predicated upon the fifth article of the agreement, in which the United States promises to pay for 5,000 tons of coal. Had the amount delivered been 8 per cent over the tentative amount named in the first article of the agreement, could the United States have stood on the fifth article and declined to pay for the excess over 5,000 tons? Certainly not; no more than it could have been compelled to pay for 5,000 tons when it only received 4,634 tons. There is no conflict between the first and fifth articles in the contract. It would have been ridiculous to have provided in the fifth article for payment for "about" 5,000 tons, and it is just as ridiculous to argue that 5,000

tons should be paid for whether the amount delivered fell short of or exceeded that amount. It is perfectly manifest that the use of the term "five thousand tons" in the fifth article of the agreement was not for the purpose of fixing definitely the amount of coal to be delivered or to be paid for, but they are merely descriptive words referring to and being regulated by the conditions of the first article of the agreement.

These considerations, coupled with the fact before noticed that the parties delivering and receiving the coal had no correspondence or negotiations whatever looking toward the delivery of the 366 tons previous to the time the same was tendered, clearly warrant the conclusion reached by the Court of Claims, and its judgment should, therefore, be affirmed.

LOUIS A. PRADT,
Assistant Attorney-General.

PHILIP M. ASHFORD,
Special Attorney.

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Supreme Court of the United States.

No. 71.—October Term, 1904.

John J. Moore, Trading under the Firm Name of J. J. Moore & Company, Appellant, *vs.* The United States. } Appeal from the Court of Claims.

[January 3, 1905.]

Mr. Justice McKenna delivered the opinion of the Court.

The appellant is a general commission merchant and shipper at San Francisco. He filed his petition in the Court of Claims, consisting of two paragraphs, in the first of which he claimed reimbursement from the United States of the sum of $1,053.36, demurrage paid by him for the detention over lay days of two ships chartered by him to transport coals to Honolulu and there to be delivered to the United States. By the second paragraph he prayed the recovery of the sum of $1,120.87, the difference between the contract price of 366 tons of coal, which the United States refused to receive, and the price obtained for the same upon the sale in open market.

The causes of action rested on two contracts entered into by appellant with the United States through the proper officer of the Quartermaster's Department, United States Army, by which appellant agreed to furnish and deliver to that department, Honolulu, Hawaiian Islands, "*at the wharf*," about 3,900 tons of the best merchantable "Wallsend" Australian steam coal, at the rate of not less than than 100 tons a day, at 2,240 pounds to the ton, dangers of the sea and any causes beyond appellant's control excepted, the deliveries to commence on the arrival of the Hawaiian ship Euterpe at Honolulu, on or about July 23, 1898, for and in consideration of which appellant was to be paid at the office of the Quartermaster, United States Army, at San Francisco, California, at the rate of $9 per ton, in gold coin of the United States.

And by the second contract appellant was to deliver "on wharf, as customary," about 5,000 tons of the best merchantable Australian, Seaham, Wallsend or Pacific Co-operative steam coal, deliveries to commence at Honolulu on or about October 1, 1898. The other facts were found by the Court of Claims, as follows:

"III. That at the respective times these contracts were made it was the custom at San Francisco between shippers and shipowners to insert in their charter parties a stipulation to the effect that cargoes were to be dis-

charged as customary, in such customary berth or place as consignee shall direct, ship being always afloat, and at an average specified number of tons per weather working days (Sundays and holidays excepted), to commence when ship is ready to discharge, and notice thereof has been given by the captain in writing, and if detained over and above the said laying days, demurrage to be at 4d. register ton per day, which stipulation was duly inserted in the contract of the claimant with the ships employed by him to transport the coal mentioned in the contracts. It does not appear that the officers and agents of the defendant, who were authorized to make, and did make, the contracts for the defendant, had knowledge or notice of such custom, nor that the contracts or either of them were made in view of such custom.

"IV. The claimant [appellant] discharged his said contracts as follows: The first contract: By the arrival at Honolulu of the ship Euterpe with 1,543 tons of coal, July 31, 1898, which was placed in berth at the wharf by the harbormaster of said port August 8, 1898, at 2.15 P. M., and commenced discharging coal at 3 P. M. same day, and finished August 29, 1898, consuming eighteen working days. If she had been discharged at not less than 100 tons per day, the time consumed would have been sixteen days. It does not appear that the defendant was at fault either in arriving at the wharf, nor in the discharge of the cargo afterwards. The court finds the defendant was able, ready, and willing to receive the cargo as rapidly as discharged at the wharf. The claimant paid to the shipowner $1,053.36 demurrage for these delays.

"The second contract: 1. By the arrival of the bark Harvester, with 2,179 tons of coal, August 28, 1898, at Honolulu, which was placed at a berth at the wharf by the harbormaster September 16, 1898, and began discharging coal on that date, and completed same October 7, 1898, a period of eighteen working days. It does not appear that the defendant was at fault in the loss of time of said last-mentioned ship in arriving at the wharf.

"2. By the arrival of the ship General Gordon at Honolulu, August 27, 1898, with 2,455 tons of coal. While at anchor, September 9, 10 and 11, 330 tons were discharged into steamship Arizona, a transport of defendant, for its own use, after which the Gordon was placed at a berth at the wharf by the harbormaster, September 14, at 1 P. M., and then commenced the further discharge of the cargo, completing the same October 4, no delays having occurred at the wharf. It does not appear the defendant was at fault in the ship's delay in reaching the wharf. In the case of each ship the defendants had notice in writing of their respective arrivals within twenty-four hours thereafter. The wharves at Honolulu are under the control of a harbormaster. The practice of such harbormaster was to assign ships to berths at the wharves in the order of their respective arrivals, and this practice was followed by him in respect to the ships mentioned. Claimant paid said shipowners for delays $1,433.12 to the Harvester and $744.48 to the General Gordon. All coal delivered was paid for by defendant.

"V. The coal actually delivered under the second contract was 4,634 tons, completed October 7, 1898. About a month subsequent to this claimant purchased 366 tons of coal of the barkentine Omega, then in the Honolulu harbor, and tendered the same to the defendant upon its contract of June 23, 1898, but the defendant refused to receive it, whereupon

claimant sold the same in market, for the best price he could obtain, at $3.06¼ per ton less than $9, the contract price with the defendant, equivalent to $1,120.87 in all, and to his loss in that amount.

"VI. At the time of the delivery of the coal mentioned in the foregoing findings the Honolulu harbor had eleven docks or wharves, three of which only were used for the discharge of coal. The docks were crowded, and several vessels were moored at the reef. By local regulations of the Government, a harbormaster had general supervision of all vessels in the harbor, and all vessels were anchored and assigned to berths, in the order of their arrival, by the harbormaster. There were no lighters for public use, and defendant had none at the port, and it was usual or customary to discharge freight upon the wharves. The defendant had no authority over the wharves, and was subject to local regulations, and the order of the harbormaster, the same as individuals."

As a conclusion of law the court decided that appellant was not entitled to recover. (38 Ct. Claims, 464.)

The question in the case is whether the delay at Honolulu in the delivery of the coal was caused by the United States or by appellant; or, in other words, whether it was the duty of the United States to designate and furnish a wharf for the discharge of the coal from the ships, or its duty only to receive the coal at the wharf when delivered there by appellant.

The question is one of law. Any fault in fact upon the part of the United States is excluded by the findings of the court. The cause of delay is expressly found to have been due to the conditions in Honolulu harbor, and that to these conditions the United States was as subordinate and subject as appellant. The liability of the United States is asserted, nevertheleas, on account of the custom existing in San Francisco between shippers and shipowners.

But the terms of the contracts are explicitly opposite to the custom. The custom requires a consignee to designate a berth for the discharge of cargo, and is hence responsible, it is contended, for the delays to a ship in reaching the berth, though caused by the conditions existing at the port of discharge. The contracts have no such provision, nor do they refer to the charter parties entered into between claimant and the ships. The contracts require delivery to be "at wharf" (first contract); "*on wharf as customary*" (second contract). "As customary" meant the mode of discharging freight at Honolulu. (Culver, Carriage by Sea, 696.) The custom there was to discharge freight upon the wharves. The terms of the contracts, therefore, are reinforced by the custom at Honolulu, and the custom at San Francisco cannot prevail against them.

The effect of usage upon the contracts of parties has been decided many times. It may be resorted to in order to make definite what is uncertain, clear up what is doubtful, or annex incidents, but not to vary or contradict the terms of a contract. Various applications of this principle are presented in the following cases: *Barnard* v. *Kellogg*, 10 Wall. 383; *Herne*

v. *Maine Ins. Co.*, 20 Wall. 488; *Insurance Co.* v. *Wright*, 1 Wall. 456; *Odnick et al.* v. *Ford*, 23 How. 49; *Hostetter* v. *Park*, 137 U. S. 30; *National Bank* v. *Burkhart*, 100 U. S. 686. We do not think it is necessary to make a detailed review of these cases or of the cases which appellant has cited in which consignees have been charged with demurrage. To trace and relate the various conditions upon which consignees have been held liable would extend this opinion to too great length, and discuss matters irrelevant to the case as we regard it. In all of the cases cited there was an omission of duty on the part of the consignees In the case at bar there was no omission of duty, and, besides, the United States was not a consignee of the coal in any proper sense of that word. There was no privity between it and the ships. Its contract was to receive coal at the wharf and pay for it on delivery there, after inspection. Its contract was not to receive coal in lighters or to bear any expense in the transportation to the wharves. It is manifest that coal on board ships in a harbor is not in the same situation as coal on a wharf. The wharf, under the contract, was the place of destination, and the appellant took the chances, as observed by the Court of Claims, of obstacles which should intervene to delay the delivery of the coal at the wharf, as they did of other obstacles which might have intervened to prevent the coal reaching the harbor. It was not strictly the coal in the ships that the United States contracted to take. It was certain quantities of coal, and on account of this, in the exercise of their rights under the second contract, appellant bought coal in the open market and tendered it in fulfillment of that contract. The liability of the United States to accept we shall presently consider. We cite the fact now as illustrating the meaning of the contract. It is manifest from these views the Court of Claims was right in holding the United States was not liable for the delay caused to the ships by the conditions which existed in Honolulu harbor.

2. By the terms of the second contract (June 23, 1898) the appellant agreed to deliver and the United States agreed to "receive about 5,000 tons" of coal, delivery to commence with about 2,200 tons, to arrive at Honolulu on or about the first day of October, 1898. By the 7th of October delivery was made of 4,634 tons. About a month subsequently appellant purchased 366 tons of coal of a ship then in the harbor, and tendered the coal to the United States in fulfillment of the contract to deliver 5,000 tons. The United States refused to receive it, and appellant sold it in the open market for $3.06¼ per ton less than $9, the contract price. This was the best price which could be obtained, and the loss to appellant was $1,120.87. The Court of Claims held that the appellant was not entitled to recover. We think this was error. The obligations of parties were reciprocal; one to deliver, the other to receive, about 5,000 tons of coal, and equally reciprocal is the liability for non-performance of

the obligations. The only question can be, is 366 tons less than 5,000 tons, "about 5,000 tons"? We think not. The difference is too great. We said in *Brawley* v. *United States*, (96 U. S. 168, 172,) that in engagements to furnish goods to a certain amount, the quantity specified is material and governs the contract. "The addition or the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight." See also *Cabot* v. *Winsor*, 8 Allen, 546, 550; *Salmon* v. *Baykin*, 66 Md. 541; *Indianapolis Cabinet Co.* v. *Herrman*, 7 Ind. App. 462; *Cross* v. *Eglin*, 2 Barn. & Adol. 106; *Morris* v. *Levison*, 1 C. C. Div. 155, 158; *Boune* v. *Seymour*, 10 C. B. 337, 353; 38 N. Y. Supp. 341, 342.

The record does not inform us why the United States refused the tender, and we must assume that it had no other justification than its supposed right under the contract.

Judgment reversed and cause remanded with directions to enter judgment for appellant (claimant) in the sum of $1,120.87.

Mr. Justice HOLMES concurs in the result.

True copy.

Test:

Clerk Supreme Court, U. S.